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MR. DON RUEBEN
MR. ANDERSON

THE COURT: Good morning.

THE CLERK: 81 C 6434, Atari vs. North American Philips. Motion for Disqualification.

THE COURT: Let me tell you that I regret very much that I did not have the time to deal with this matter yesterday. If I had the time, I think I could have spared you the difficulty of coming here. But, I did not have the time. So, now, we are here.

MR. BODE: We appreciate your taking the time, today, Your Honor.

Keith Bode for the plaintiff. I wanted to introduce myself and explain my presence here.

Since Mr. Katz is going to be one of the witnesses, the plaintiff asked us, that is, Judge Tone and myself to represent the plaintiff in this proceeding yesterday afternoon. And we worked on it last night. Unfortunately, Judge Tone has the flu and he called me this morning and said that he was--

THE COURT: Sorry to hear that.

MR. BODE: --going to doctor, and you know how serious that must be.

THE COURT: Express my regrets and sympathy.

MR. BODEN: Thank you.

So, we are ready to proceed, but we would like leave to formally file our appearances on Monday.

MR. REUBEN: No objection.

MR. BODE: Thank you.

MR. REUBEN: Your Honor, two things. There are three preliminary matters which can be off the record.

I apologize for my garb, but--

THE COURT: I had not noticed.

MR. REUBEN: Since I am not going to Philadelphia, I am going to a dog show and I am dressed for the dogs; and I hope Your Honor believes me more than my wife, who came down with me, because she did not believe any Federal Court held Court on Saturday.

THE COURT: My wife is seated over here. She came down with me too, so as soon as we finish, we have other things to do.

MR. REUBEN: We would certainly--to shorten this hearing--stipulate that Mr. Maher was a--until December of 1982--counsel to this association. I think there is no dispute that he--we had no direct, professional relationship or engagement by the parties seeking to disqualify us.

It is their motion. They are going to proceed. We designate Mr. Maher to represent us and move to exclude all the other witnesses.

THE COURT: All right.

MR. BODE: Well, Your Honor, as to that, we do not have any objection, except that I would like to have

Mr. Katz who would be the first witness remain thereafter to assist me.

THE COURT: All right. All of the witnesses will be excluded. There is a room across the hall.

Mr. Grice, will you see that that attorney and witness room is open?

THE CLERK: Very well.

THE COURT: Let me assure you that I have read very carefully every document that has been filed on this, so I am familiar with the facts you have alleged and I want to tell you something else that came up yesterday.

I am satisfied that this is not a matter that can be resolved as a matter of law. There are a number of factual question here, some of which occur to me which perhaps have not occurred to the lawyers.

MR. BODE: That could well be, Your Honor.

THE COURT: All right.

MR. BODE: But, I think it is true that there are-- I think it is true that there are some factual questions and there are a number of matters which are not really in dispute.

THE COURT: All right.

MR. BODE: Let me, if I might, Your Honor, just take two minutes, literally, to say what I think the issues are.

This is really basically a Canon 4 situation, a representation by an attorney of an interest adverse to a former client and the Slaughter case in the Seventh Circuit sets forth the two-fold test that there must be proof that there was--

THE COURT: First, it seems to me that you are going to have to establish that there was representation--

MR. BODE: --was an attorney-client relationship.

THE COURT: --of the plaintiff.

MR. BODE: That is correct.

THE COURT: That seems to me to be the basic question.

MR. BODE: That is the basic question. And the only other question is the substantial relationship between that subject matter and the subject matter of this litigation.

THE COURT: Well, yes.

MR. BODE: That is right.

THE COURT: Well, yes. That becomes relevant--

MR. BODE: And Your Honor, the Westinghouse case shows how that applies in the particular situation of the trade association. There is no automatic exclusion, but, on the other hand, you do not forget about the situation just because the trade association itself pays the legal bills and is, you know, designated on the law firm's books as the client, but you look at the situation of whether there

is a perception--reasonable perception--by the people involved that they are consulting and dealing with the lawyer in an atmosphere of the professional relationship and entitlement to confidentiality.

I agree those are the issues here and once that is established, I think, given the nature of the subject matter, the substantial relationship requirement is very readily and almost self evidently satisfied, Your Honor.

I would like to call Mr. Katz as our first witness.

(Witness sworn.)

THE CLERK: Be seated, please. State your name and spell your last name for the record. Lean forward; speak to this microphone. Keep your voice up.

THE WITNESS: My name is A. Sidney, S-i-d-n-e-y, Katz, K-a-t-z.

BY MR. BODE:

Q And are you a member of the firm of Welch & Katz and one of the counsel for the plaintiff, Midway Manufacturing Company in this litigation?

A Yes.

Q How long have you been a member of the bar?

A Approximately 17 years.

Q Do you have any specialty?

A Yes.

Q What?

A My specialty is in the area of intellectual property law, particularly, patents, trademarks and copyrights.

Q Now, directing your attention to the period May 20 through December 31, 1982, was the parent corporation of the plaintiff--that is Bally Manufacturing Corporation--a member of the Amusement Device Manufacturer's Association?

A Yes.

Q And I would like Your Honor to call that the "Association", which I think is generally done.

THE COURT: I understand.

BY MR. BODE:

Q During that period, did you have occasion to come into contact with Mr. David Maher of the firm of Reuben and Proctor?

A Yes.

Q And what was Mr. Maher's position, if any, with respect to the Association, at that time?

A He was the counsel for the Association.

Q And he was then with Reuben and Proctor?

A Yes.

Q When was the first occasion that you had contact with Mr. Maher in connection with Association matters?

A I believe it was early in 1982, I believe, in either February or March--late winter or early spring of 1982.

Q And how did that contact occur--in person or by

telephone, or otherwise.

A By telephone.

Q Who placed the call?

A He did.

Q And introduced himself?

A Yes.

Q And what was said in that conversation?

A He indicated that he was counsel for--he was with Reuben and Proctor--he was counsel for the trade association, and that they were setting up a meeting--I believe it was at the Standard Club--for counsel for the member companies of the Association and that the meeting--the purpose of the meeting was going to be to discuss the copyright protection for video games.

He indicated that the members of the Association had a common interest in the protection of video games and to--they were more or less waging a war against piracy of these coin operated video games, and that, if I attended the meeting-- since Midway was very active, and perhaps, taking the lead role in the cause at that time--that my attendance at the meeting would be of mutual benefit to everyone; that there would be an exchange of information as to what has transpired in the cases, what the law was developing, what it should be, and that the--that there was going to be--what they were looking forward to was to some kind of

interchange of documents later. That would be discussed at the meeting.

Q Did you, in fact, attend that meeting?

A Yes.

Q And what occurred at that meeting?

A There was a general discussion of the development of the law with respect to the protection of video games under the copyright law, trademark law. And there was an attempt to set up some kind of a central repository for documents which was going to be under the supervision of Mr. Maher so that decisions and orders that were favorable would be able to be communicated to the different--or transmitted to the different attorneys representing the members.

And the desire was that there be--that there be legal precedents set that would establish, as quickly as possible, good law in the United States under the new 1976 Copyright Act, which had become effective in '78, to protect video games, to show--so that something could be done to stop the piracy in that area.

Q Now, directing your attention again to the period from May until December 1982, did you, in your dealings with the Association, observe whether the Association, in fact, had any program with regard to copyright of video games?

A Yes.

Q And what was that program?

A They did, in fact, implement collection--the process of collecting cases and there was a lot of communication between counsel for members of the Association in--for the protection of video games. * And there was an attempt to-- and in fact they did establish further--or set up further meetings in connection with that cause.

Q What role, if any, did Mr. Maher play in this program?

A Mr. Maher was the--as far as I knew--was the main instrumentality through which the meetings were being set up. Most of my communications with the Association were through Mr. Maher.

He would call me. We had had some discussions--brief discussion on the telephone. I would forward-sometimes I called him to send him copies of recent cases, and, perhaps, make a few of my comments in commenting on the case--cases in particular, with respect to video game copyrights, which was my primary interest.

The--he also did other things. I think he monitored legislation. I believe he sent me from time to time some bills, pending bills regarding proposed legislation that would affect video game companies. And he disseminated the information that he obtained. And so I was a recipient of information also.

Q Now, directing your attention specifically to the meetings of October 14 and 15, 1982, which are referred to

in your affidavit, did you, in fact, attend meetings at the offices of Reuben and Proctor in connection with Association matters on those dates?

A Yes.

Q And how did you come to attend those meetings?

Were you invited?

A Yes.

Q By whom?

A By David Maher.

Q And how did this--how was this invitation made?

A By telephone.

Q Who called?

A I believe Mr. Maher called me sometime in the middle of September, 1982 to tell me that a meeting was set up.

Q Now, wait. What was said during that phone conversation?

A Mr. Maher indicated that there was going to be a two-day meeting set up at their offices. The first day was going to be a small meeting; that there was going--they were arranging a technical representative, or a technical representative had been arranged, which turned out to be Dr. Keane from Bally. And there was an attorney from England by the name of Amedee Turner, who was a British barrister and a Queen's counsel, who was coming in for that meeting, and he was going to be there, Dave Maher was going to be

there; I was there and there would be a few other people; that the purpose of that meeting was to, essentially, educate or advise Turner with respect to what the law was in the United States which was probably the most advanced--the country having the most advanced law in this area; that there was going to be a technical discussion with respect to how games were designed and how they should be protected--how they were protected, in my view, in the United States.

And that he was going--that is, Turner--would then be able to do two things. He was going to have them--there was going to be a meeting on the next day--October 15th--with a larger group of attorneys or members of the Association. And that he was going to describe to them how, under European laws, particularly England and France, the video games would be protected.

And also, from his--from the education that he was receiving--that Turner was going to receive--he would then go back to Europe--he was also a member of the European parliament--and he was proposing legislation for the European Common Market in the area of intellectual property law, which would better protect the video game--video games--against copiers.

Essentially, he had told me that this was going to be the program and he wanted to know if I was going to do it and I told him yes.

Q And did Bally arrange to have Mr. Keane attend also?

A Yes.

Q Now, at the meetings on October 14 and 15, was Mr. Maher present?

A Yes.

Q And what was your perception of Mr. Maher's role during those meetings.

MR. REUBEN: I object to his perception, Your Honor. He can tell what he saw.

MR. BODE: Well, Your Honor, in the Westinghouse case, clearly makes--indeed the critical factor in these kind of trade association cases, the perception, which must be a reasonable perception--

THE COURT: Perception by whom?

MR. BODE: By the person who is objecting and seeking the disqualification.

THE COURT: All right. I will overrule the objection.

BY THE WITNESS:

A Well, I think there were two roles--I mean--the roles were different at different meetings.

On the October 14th meeting, which was a small one--I think--I believe there were seven people present in a small conference room at Reuben and Proctor's firm. It

was, you know, around a circular table. There, Mr. Maher more or less guided the meeting by raising the points that were to be discussed and generally, when people went off on tangents or went off into perhaps too much detail, pulled the meeting back along the outline that he had in mind.

The discussion--Dr. Keane discussed technical matters--

BY MR. BODE:

Q Now, wait. The question was not what happened at the meeting. We will come to that. The question was your perception of Mr. Maher's role at that time.

A Well, okay. That was one role that he served--

THE COURT: May I interrupt, in view of the fact that I overruled the objection? Will you have Mr. Katz establish for the record the perception applies to the party who believes he or it is being represented. Is that not right?

MR. BODE: Yes, that is correct, Your Honor.

THE COURT: Would you ask Mr. Katz to state for the record when he was there, in what role was he there? Because that is where the perception becomes important.

MR. BODE: In what role Mr. Katz was there?

THE COURT: Sure, since you asked him about his perception--

BY MR. BODE:

Q Could you tell the Court--

THE COURT: I think the perception would then tie

into the plaintiff in this case.

Would you state for the record?

BY MR. BODE:

Q What role were you there?

A I was there in the role of counsel--as a representative for Bally and Midway, at the meeting. And, the--

Q And for how long have you represented them in patent matters?

A Since 1973.

Q Okay.

A Approximately ten years.

Q All right. Would you go on and tell us your perception of Mr. Maher's role?

A Mr. Maher was there representing the trade association, naturally, that he was there as counsel for the trade association, but I perceived his role as also being representing Midway's interests at that meeting.

In connection with the subject matter that was being discussed in great detail, and that is the copyright protection for video games--and, in particular, the Pac Man game, which is one of Bally's games.

Q Now, could you identify--you have already indicated where these meetings took place. Would you tell us who was present, first on the 14th and then on the 15th?

A Okay. At the--on the 14th, as I said, I believe

there were seven people present. I will try to recall them around the table.

Myself, I believe David Maher was on my left.

Then Amedee Turner, Dr. Martin Keane, then there were three people, two I believe were with a company--another company--another member of the Association, Destron/G.D.I. and, I believe, there was one gentleman from Sega, Gremlin Sega, which is another member.

Q And how long did the meeting on the 14th last, approximately?

A It started in the morning, approximately around 9:00 o'clock, or so; and terminated at the end of the business day, probably about 4:30 or so.

Q And who was present on the 15th? First of all, were the same people present again?

A I believe some of the same people were present; some were not present.

Q All right. Well, tell us who was present?

A On the 15th, there were a larger number of people. It was in a larger conference room at Reuben and Proctor. And there were approximately--I don't know--11 or 12 people, I believe. Approximately a dozen.

I don't know if I can name all of them, but I can try. If you want me to.

Q As many as you can, without taking too much time.

6 A Okay. Other than myself, Amedeo Turner, Dave Maher,
7 there was Melvin Goldenberg, who was representing--he was
8 an attorney representing Williams; Bud Shulman, an attorney,
9 I believe, representing Deatron/G.D.I. There was an--let's
10 see--Karen Witte was there, as an attorney representing Atari;
11 and Schoenberg--a fellow by the name of Schoenberg, who was
12 an attorney representing Stern.

13 Others might come to me, but those are the ones
14 that come most readily to mind.

15 Q These companies that you mentioned were members
16 of the Association?

17 A Yes.

18 Q Aside from Mr. Turner and Mr. Maher, whom you have
19 identified, were all of those present on both the 14th and
20 15th, employed or counsel for one of the members of the Associa-
21 tion?

22 A That was my understanding.

23 Q Now, will you then--and how long did the meeting
24 last on the 15th?

25 A I don't think--I don't know. It started in the
morning, about 9:00 o'clock, I believe, and it went to a
late lunch- buffet lunch or something--sandwiches or something
that was brought in--I think a buffet of sandwiches. I believe
that I-- it was sometime into the afternoon; maybe 3:00 o'clock,
something like that.

Q All right. Now, will you tell us what was said during the meetings on the 14th and 15th?

A On the 14th, I presented some overview of the law initially. Dr. Keane discussed, generally, how games were designed, starting with the initial conception of a game--as a typical matter, and going through the music, the graphics, the images that had to be generated, the programs--the computer programs in different forms, and finally, the games and how it was so-called "tweaked" or fine tuned to perfection as they view it, to be the proper way for the final product to be presented. And I discussed at each level the--what my views were with respect to how to protect the game under the developing law in the United States.

And, in that regard, I had occasion to refer to various problems that we had been presented in the various cases that we had been involved in, particularly at the International Trade Commission, which--where there had been in one case, I believe approximately 55 respondents, and which related to Pac Man. And the evidence that we used; the legal positions that were taken; the general types of evidence, with respect to how do we prove up title and with respect to certain presumptions that we were entitled to in the United States, but would not--I know, by comparison, that they wouldn't be entitled to in European countries. And the general strategy of the litigation that we had been involved in.

I talked about the strengths in our position, and I also pointed out particular areas of weaknesses that I thought in our position, that had come up in these various cases. That was one area of discussion.

Another area of discussion on the 14th was the scope of copyright protection. We talked about the question of, how do you tell when a game is infringing. How many--what kind of changes do you have to make in the game for it to be noninfringing, and what are the tests.

And I talked about a strong theory that I thought should be presented for maximum scope, or widest scope of copyright protection. And I talked about what I thought were weaker positions.

And Mr. Turner used, as an example in these discussions, particularly Pac Man, which he selected, and it was the subject matter of discussion. For example, what happens if you make the character look different than Pac Man? How different? What about the--he talked about the copyrightability. This was a subject of discussion--the copyrightability of the general rules of the game versus the specific rules or the detail operation of what happens on the screen, for example, in response to the computer control. For example, that after certain--in certain situations, the ghost figure always goes a certain way. What happens if you change it to another character and it's not a ghost, but that chasing figure goes

in the same way and follows those very detailed rules. How does that fit under the copyright law? How do you apply the copyright law to that.

We talked about strong positions. We talked about weaknesses in those positions.

A third--another area that we discussed in that meeting, was a proposed amendment to the law that Mr. Maher passed out. It was some House of Representatives bill proposing to amend the copyright laws to make copyrightable the so-called algorithm, which is the mathematical equation that underlies a computer program.

And we talked about, if that was beneficial to the industry, or if that wasn't beneficial to the industry. Dr. Keane, I believe, expressed his concern about what would happen and what industry it would benefit; whether it would harm or hurt the amusement game--the coin operated amusement game industry if that became the law.

We also talked about computer programs and their copyrightability. For example, we talked about the copyright protection of the source code. We talked about the copyright protection of the object code, which was placed into the ROM--what they call, the read only memory, which is part of the computer system in the game. And we also--I discussed some potential weak-- potential weaknesses in the theory of protection that might be encountered in connection with

some recent cases that had distinguished different kinds of programs for different uses. And so, that was a subject of discussion.

We also discussed the--how one might attack--in terms of the strategy. We talked about strategy of litigation in connection with the presumptions that Midway relied on to--in order to bring its cases. That is, it has a Certificate of Registration, which gives rise to certain presumptions of the correctness of title and the validity of the copyright.

And I discussed the weaknesses. How I would, or how someone could attack those presumptions to invalidate the copyright or to attack title by analogy to what would be necessary in a European country that was under the Berne Convention, where you were not entitled to presumptions, and you have to put in your evidence directly. You did not have the benefit. You had to prove them up yourself. And so, that would highlight the weaknesses that one would have in defending his presumption in the United States. That was the deal--that was the subject of some discussion with Amedee Turner, Dave Maher and myself at that meeting.

Another area that was discussed was in connection with our theory of fixation of the audiovisual work--the copyright in the audiovisual work under the 1976 Act. That is--I discussed the case we had at the International Trade Commission, but I discussed--I went beyond it.

I discussed the--I discussed how I thought that the theory might be attacked. I discussed the--in terms of the technology, I have a background in electrical engineering and I suppose--that tied in with Dr. Keane's descriptions of actually how they designed the games and how they operated in somewhat greater detail.

But, there was a discussion of a theory for attacking--how I would attack the copyright in the audiovisual work in a system in the Pac Man game.

We talked about the--I talked about how we established the fixation by virtue of the use of expert witnesses in connection with other cases.

I think--no, there was another area, I believe. I don't know if I covered it. In connection with the scope of the copyright, which I previously mentioned, we discussed the various theories--theories of proving infringement and I can-- I mentioned the strengths and weaknesses, but there was--I alluded to theories of derivative work, based on derivative work provisions in the Copyright Act, and I discussed the merits--relative merits and demerits of that theory.

I think that covers the October 14th meeting.

Q How about October 15th?

A On October 15th, some--a lot of these points were discussed on a more general basis. The--some of the--some of the things-- some of the points, such as the scope of

copyright protection was discussed in some detail.

This specific case, Midway--Atari and Midway vs. North American Philips came into the discussion during that meeting, particularly with respect to the scope of copyright protection by proof of direct similarities versus proof by violation of the copyright owners' right--exclusive right--to make derivative works, given that a derivative work has, by definition, differences from the original work; that there was a view that that would be a broader scope of copyright protection.

But, we went into some merits and demerits, but not with respect--not in the detail we had done the day before, I believe.

And we talked about--various attorneys spoke about particular cases they had and took people through a step by step process of what had happened in particular cases. I recall at least one or two attorneys doing that and relating their experiences in their case, the problems they had in their evidence; how the result happened to come; what happened in the case; the current status of it, and so on.

And there were some other attorneys who discussed some other theories of characterizing how to determine when-- what was a copyright infringement from what wasn't. Assuming that a person set about to design a game, how much different would it have to be before it wasn't an infringement. That

kind of thing. And people presented their theories and ways of looking at it.

And at that meeting, Mr. Turner was sort of the moderator and asked a lot of questions of people; got a lot of answers and sort of presented--he presented his view as to how--what the situation would be under some of the laws in European countries, as he viewed it, and what would be the desirable goal if you were to have a new law in the European community, what should that be? How far should it go for protection of the video game copyright.

I think that was--Mr. Maher at that meeting participated to some extent in the discussions, but he wasn't the moderator.

Q Now, you mentioned that Mr. Keane of Bally was present on the 14th. And what part, if any, did he take in the discussions?

A He spoke at some length, on and off. And had--he described an electronic printed circuit board, an electronic board that I had--I saw at the meeting. It seemed to me that, perhaps, the understanding of what was going on would be facilitated greatly by having an actual example of the electronic system in front of the group.

So, I called my office, which was right down the street and somebody brought over a sample. I think it was an Exhibit from a case. A sample of an electronic printed

circuit board. I believe it was the Pac Man game.

And Dr. Keane then described what the various components were, what they did on what--what operated to function, to produce the copyrighted audiovisual work, that is, what you see and what you hear. What operated on the program; where the program was contained, and what components. And we had it on the table and everybody examined it, and he explained it--the technical aspects. And I attempted to explain the legal aspects as I perceived it, and how the different issues arose.

He also spoke at great length about how people could copy the game. There were various levels of copying. There was, you know, just the copying of the audiovisual works, that is, you look at what you see and what you hear and make your own system, and there was the copying of the program. There was, you know, sort of, a direct copy, or exact duplication of the entire system.

And then he talked about certain techniques--electronic techniques that would prevent, perhaps, people from copying things so readily. That was the subject of some discussion.

I think that that answers your question.

Q Did Dr. Keane say anything about describing the mode of development of video games?

A Yes. That is, by the mode of development, I alluded to earlier, how the game was originally conceived, what people

did in developing a game. And who did what in connection with the various tasks that needed to be performed to go from the bare concept to the final product. He took people through those stages.

Turner was determining--Mr. Turner was determining at what point creativity--at what point there was creativity that would be protected under the copyright laws of the various countries; and we were pointing out how the creativity at different points would be protectible under the United States law by virtue of the creativity itself. And we talked a little bit about the old Copyright Act and the differences between that one and this one.

Q My hearing may be bad, but I thought that at the beginning of your discussion of this meeting, that you said that it was Dr. Turner who described the development of the games.

A Oh, I meant--I'm sorry, I misspoke. Yes. It was Dr. Keane. Dr. Keane did that discussion, not--it was not Mr. Turner.

Q Now, during the discussions in the meetings on October 14 and 15, were you guarded in what you said?

A No.

Q Why not?

A It was my understanding that everybody at the meeting had--they were all on the same team. They all had a common

interest in protecting video games from copyright protection-- I mean from copiers; of providing the maximum amount of protection for the games, and I didn't think there was any problem.

I considered Mr. Maher to be representing not only Midway, but Midway's interests, you know--not only the Association, but Midway's interests as an Association member with respect to this matter. It seemed that--I mean--if he wasn't representing--if he hadn't been representing Midway's interest as an Association member, I didn't know what interests he would be representing, because the Association itself is just members. And they all seem to have this very strong desire for maximizing the protection of their video games. It seemed to be a joint effort.

Q Would you have said what you said during those meetings if an adversary of Bally, with respect to the copy-rightability of Pac Man, were there?

A No.

Q Now, Mr. Katz, I do not want to take you through every detail of your affidavit. You have read it and you have signed it. Are the statements in there true and correct?

A Yes.

Q Now, you have attached a number of Exhibits to your affidavit and Exhibits G, H, I, J and K are described as letters exchanged between yourself and Mr. Maher. Let me ask you if, in fact, those Exhibits were letters which

you and Mr. Maher exchanged with respect to the work of the Association on this project?

A As far as I know, I believe so. I don't--they are not attached to my copy here.

Q You do not have it? Well, I will give them to you.

A Yes.

Q And also, the first several Exhibits to your affidavit are minutes of the Association, is that right?

A Yes. Yes.

Q Now--

A Excuse me. These minutes, A, B, C, D, E and F, those were copies of documents that were, as far as I know, obtained from the files of Bally, or those of our firm.

Q Now, in addition to these meetings, what other matters did you do and perform in connection with this program with regard to copyright protection of the Association?

A Well, there were, I believe, at least one or two other meetings that were arranged with Mr. Maher whereby an attorney that Midway used extensively in Washington, D. C. in connection with its International Trade Commission and U. S. Customs proceedings, was asked to arrange for an attorney, a government attorney that worked with the International Trade Commission, to appear at a meeting, which I believe occurred in July of 1982--it was an earlier meeting--

to discuss the advantages and disadvantages of enforcement of video game copyrights before the International Trade Commission.

Q All right. Now, for purposes of comparison of subject matter, will you tell us, briefly, what the nature and basic issue is in this litigation?

A It is my understanding that the basic issues in this litigation are the validity of the Pac Man copyright, which was--which is owned by Bally Midway, and the scope of protection to be afforded to that copyright and the infringement of that Pac Man copyright by North American Philips' creation, manufacture and sale of the K. C. Munchkin game.

Also, I believe there are issues in this case relating to the title; that is, whether Bally Midway actually owns the copyright, whether they are entitled to enforce its rights in the copyright against North American Philips, and there may be some other issues also.

Q And North American Philips, and the other defendants, are Mr. Maher's new clients, is that right?

A That's correct.

Q I have no further questions, Your Honor.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. REUBEN:

Q Mr. Katz, you refer to Exhibits that were put--

were attached to your submission of May 31st--you referred to some of them, G, H, I. Do you recall that testimony?

A Yes, I think so.

Q I give you a copy--I will mark this 1--can I give you a copy. Did you believe that confidential information was disclosed by you on October 14th and 15th at that meeting?

A Yes.

Q I would like to test your definition of confidential. Let us look at A, which I think are the minutes of the Association for October. You mark at the bottom of that, what, "Confidential Trial Counsel Only". Do you regard that as confidential information?

THE COURT: Could I inquire, who put this stamp on here, "Confidential Trial Counsel Only"? Who put it there?

BY MR. REUBEN:

Q Did you put that stamp on, or somebody in your firm, sir?

A I didn't. I believe that it may be someone in my firm.

Q So, but it emanates--the stamp was done by your firm as part of the submission to Judge Leighton.

A I think there's an additional "Confidential" stamp at the bottom. I don't know who put that one on.

Q But, the "Confidential Trial Counsel Only" is your stamp, correct?

A I believe so. I believe that's true, but I'm not sure.

Q And, as a matter of fact, were not all of these Exhibits delivered to Judge Leighton or delivered in an envelope, a separate envelope, to protect their confidentiality?

A Yes, I believe so.

Q All right. Now, is Exhibit--

THE COURT: Well, why do we not eliminate--I would like to know, Mr. Reuben, and ask Mr. Katz: did the Association ever treat this set of minutes as confidential? Were you going into that?

MR. REUBEN: No. I will take Your Honor's question.

THE WITNESS: I don't know, Your Honor.

THE COURT: All right, you do not know.

BY MR. REUBEN:

Q Now, let us go--you have marked this B confidential--

A Pardon?

Q Let's see. I have got A. B is the minutes of the May meeting of the Association. Do you regard that as confidential?

A Yes, I believe for the purpose of this case, in connection with protective orders, we considered that to be confidential.

Q How about C? An Amusement Device Manufacturers Association press release, for immediate release. Is that

confidential?

A No. I don't believe so.

Q How about D, which appears to be a filing in the Supreme Court of the United States. Is there confidentiality there?

A I don't know. You raised some point about--I think you claimed it was confidential in a brief, and I think that was--I know that--I don't know if it's confidential.

Q You do not know?

A I don't know if it's confidential.

Q But somebody at your firm thought it was? Well, at the time you filed it--

A I believe everything in connection with this proceeding was--all the submissions were stamped "Confidential", to avoid any problems with protective orders, particularly after you raised the question in your brief.

Q So that it is what we said that caused you to decide what was confidential or not, is that correct?

A No. Not correct.

Q D is minutes; I will pass. F is minutes, minutes of the October meeting. G is your letter to Mr. Maher enclosing a copy of a report on recommendations for settlement of copyright problems. Do you regard your letter of December 13th, 1982, as confidential; or the report accompanied to it?

A Yes, I would consider it to be not public, but

confidential.

Q How about H? It is a copy of H.R.6983, the amendment of the Copyright Act introduced by Kastenmeier. Do you regard that as confidential?

A Well, I--

Q Just answer yes or no, sir.

A I don't have any opinion. I don't know. Mr. Maher might.

Q Mr. Maher might--is that Mr. Maher's stamp at the bottom, that "Confidential Trial Counsel", or is that your firm?

A Well, I don't know. I said I wasn't sure. I believe it's our firm. I believe that everything that was submitted in connection with this matter was marked confidential to avoid any problems with protective orders.

Q Now, let me call your attention to J. That appears to be something that came out of Mr. Maher's Apple Computer, that anybody that has an Apple Computer can get at. Do you regard that as confidential information?

A Are you talking about the letter, or the attachments to the letter, or both?

Q Either one. Either one. Take it both ways.

A I don't know.

Q Now, in your original affidavit, you said that "at all times while making the statements and disclosures

at these meetings of October 14th and 15th, I believed and understood that all persons present at those meetings, including Mr. Maher's law firm, shared a community of interests.

I would never have made such statements and disclosures if I had any inclination that any person present was or would become an adverse party or act as legal counsel for an adverse party on these issues."

A Where are you reading that?

Q Page--Paragraph 12 of your original affidavit.

Do you have it, sir?

A Yes. Right, I think it says--yes--"commonality of interests with respect to the protection and enforcement of copyrights and video games in the United States."

Q Now, on the 14th of October, were any people present who at that time were in litigation with your client, either their companies or themselves--on the 14th of October?

A I don't know.

Q Well, let us see if I can refresh your recollection.

Do you recall the names of any of the technical people besides Mr. Keane?

A I believe there was somebody by the name of Crane.

Q And he was with what company, Sega?

A Sega, I believe.

Q S-e-g-a Enterprises?

A That's right.

Q Did you have any litigation going at that time for your client with Sega?

A No.

Q Was Sega a competitor of your client?

A Yes.

Q How about Christopher Otis and Thomas Taxon of Destron, D-e-s-t-r-o-n, G.D.I. Were they present?

A I believe there were some people from there.

Q Did you have any litigation going with them?

A Not that I know of.

Q Were they competitors?

A Well, I don't know. I believe they were in the video game industry and made, or were attempting to make, video games. I don't know that they had anything on the market at that time.

Q Now, Amedee--it is A-m-e-d-e-e--E. Turner, Q.C. was present was he not?

A Yes.

Q He is not a member of the Association, is he?

A No.

Q As a matter of fact, he is a member of the European Parliament and a Q.C. from London, correct?

A That's right.

Q And he is in the process of writing the trade regulations for the European economic community; is he not?

A That's what I've been told.

Q And he is somebody that you would want to have some input with so that the regulations were favorable to your client and the industry generally; correct?

A That's right. We also retained him as counsel-- special counsel.

Q Who is "we"?

A Both the Association and Bally Midway.

Q Oh, when did the Association retain him?

A It's my understanding that he was--

Q No, I just asked you when they retain him?

A I believe prior to that meeting of October 14.

Q Do you have any evidence that they retained him?

A Mr. Turner told me that.

Q Have you, in the practice of law, become familiar with the Foreign Corrupt Practices Act?

A No.

MR. BODE: Your Honor, I object to this. I don't see where this is going, particularly on a Saturday morning.

MR. REUBEN: Oh, I know--

MR. BODE: The witness has given his knowledge, whatever it is.

THE COURT: The objection is overruled. This is cross examination. Let us find out.

BY MR. REUBEN:

Q Did Mr. Maher or anybody from the association tell you Mr. Turner was retained as counsel for the association?

A Mr. Maher said that he was--

Q Just answer yes or no.

A --bringing Amedee Turner--I can't answer that yes or no.

THE COURT: You cannot answer yes or no? Wait,

Mr.--

BY THE WITNESS:

A Mr. Maher, I believe, told me--

THE COURT: Just wait. You say you cannot answer yes or no. Mr. Reuben, the witness says he cannot answer the question yes or no.

BY MR. REUBEN:

Q Would you look at Plaintiff's Exhibit F, which was attached to your first affidavit.

A I have it.

Q Now, Exhibit F describes Amedee Turner and his qualifications, does it not?

A Yes, it contains a description of the--

Q Does it anywhere say that he is counsel in any capacity for the Association?

A I would have to read this to determine whether it actually says that.

Q Well, take your time.

A Yes.

(Brief pause.)

BY THE WITNESS:

A I don't see any reference to him being retained as counsel.

BY MR. REUBEN:

Q Did you not know that it would be totally improper to retain him by the Association and give him input concerning the writing of the trade regulations for the European economic community when he was charged with the writing of those things?

A No. I don't know that. I don't know how he was--

Q You--

A I don't know how he was retained, or if he was retained--

Q You have answered my question.

Now, at the meeting of the 14th, you said there was nobody present that you had litigation with or were involved in litigation with, but you did say that somebody from Sega was there; correct?

A That's right.

Q Were you having litigation with the parent of Sega?

A They were involved--

Q Answer yes or no.

A Yes.

Q And what kind of litigation was that?

A It was a book copyright.

Q And what was the subject of the book?

A How to play Pac Man.

Q So that the--so that you were uninhibited--you say that you would--if you had any inclination that any person present was or would become an adverse party or act as legal counsel for an adverse party, you would have been more inhibited or guarded in what you said; correct?

A They weren't adverse.

Q Sega was not adverse?

A No.

Q But, its parent was; is that correct?

A No, as it turned out, they were on our side.

Q Did you know that at the time?

A Yes.

Q So you were in litigation with them, but they were, on your side; is that correct?

A They were brought in as a third party on a cross complaint and they said--they admitted to the validity infringement and paid their--a portion of their profits over and we felt that they were sympathetic with our position.

Q Did you know at that time whether they would, at any time, change their position and become adverse to you?

A I don't know, no. I don't know. I don't recall.

Q Now, on the 15th, was there anybody present who

was adverse to you?

A In any respect?

Q Yes, sir.

A Yes.

Q Who.

A In some matters Williams was--I mean, in some matters, all of them, because they were all competitors.

Q What about from a legal standpoint; did you have legal disputes with any of those present at that time?

A Yes, there were some that we had legal--that Bally or Midway had legal disputes with.

Q Who were they?

A Williams.

Q Who else?

A I think that was the only one.

Q How about Atari, who is in this suit. Did you have a dispute with them at that time?

A Legal dispute.

Q Not necessarily in Court, but a legal disagreement.

A I don't recall.

Q Well, were you in dispute in 1982 with Atari about the Atari Pac Man cassette?

A That wasn't a legal dispute. It was--

Q Was there a dispute between the two of you?

A Yes.

Q And lawyers got involved in it--in the dispute--
did they not?

A Yes.

Q And had that dispute been resolved by October of
1982?

A I don't recall.

Q Now, Atari was present at that meeting on October
15th, was it not?

A Yes, Karen Witte from Atari.

Q One of its lawyers.

THE COURT: You did not answer audibly.

BY THE WITNESS:

A Oh, Karen Witte of Atari. That's a woman attorney.

THE COURT: All right.

BY MR. REUBEN:

Q Now, you say there was one person there that you
had a legal dispute with. Who was that?

A Williams Electronics.

Q And what was that, a copyright or trademark or
patent dispute of some kind?

A Patent dispute relating to pinball games; patent
infringement.

Q Did you regard that as a person present who you
would become--who would become an adverse party or active
legal counsel for an adverse party at all?

A No, because, in connection with the issues in this case-- Q You have answered my question.

A --we actually supplied amicus briefs and had interchanges of communication always with respect to this.

THE COURT: Mr. Katz. This is cross examination. Just answer Mr. Reuben's question as he asks them; and then leave it alone. If there is something else to be added, counsel for the plaintiff will ask you.

Let us go ahead now.

BY MR. REUBEN:

Q Now, you have in this cause at this time a dispute of some kind with Atari, do you not?

A I don't know yet.

Q But you could--you could easily have a dispute--you and Atari are positioning yourselves where Atari settles without your permission, you will have a dispute with Atari; correct?

A Well, I--

Q Yes or no.

THE WITNESS: Your Honor, I ask that--

THE COURT: Well, if you cannot answer yes or no, just say so.

THE WITNESS: But, Your Honor, this may--this involves the mental processes of--my mental processes as an attorney in this case and the rights between the two plaintiffs.

THE COURT: Mr. Reuben, would you concede as much to Mr. Katz?

MR. REUBEN: Surely.

THE COURT: All right, go ahead, Mr. Katz.

BY MR. REUBEN:

Q Let me show you what I have marked Defendant's Exhibit 2--

THE COURT: Have you finished your answer?

THE WITNESS: Yes, Your Honor.

THE COURT: All right, go ahead.

BY MR. REUBEN:

Q Did you write this letter to Mr. Anderson?

THE COURT: That letter has an Exhibit number, has it?

MR. REUBEN: 2 Your Honor, No. 2.

MR. BODE: May I see the Exhibit?

MR. REUBEN: Sure.

THE COURT: Sure.

BY THE WITNESS:

A Did I write this letter, yes.

BY MR. REUBEN:

Q Did you write that letter?

A Yes.

Q What was the purpose of that letter?

A To let Mr. Anderson know that, although there were

settlement discussions in the case going on between Atari and Magnavox concerning the Pac Man rights outside of the United States, that if there was to be a settlement of this particular case in Chicago where--in the United States--where Bally Midway owned the rights, that Bally Midway was necessary--was a necessary participant in those discussions; so that he wouldn't, be misguided in dealing with the wrong person.

Q And if that dispute comes to fruition in the very--in this very case--

A I don't know that that's a dispute, right now.

Q All right, I see. I am asking you, if it becomes a dispute, you would then have an adverse party acting as legal counsel for an adverse party on these very issues, as that term was used in Paragraph 12 of your affidavit; correct?

A No, that's wrong.

Q Okay.

What stage was this litigation in, in October of 1982?

A There had been a preliminary injunction entered. After the case had come back from the Seventh Circuit, a motion to stay the--motion to stay the injunction had been denied or vacated and we were proceeding with--I believe, we were in discovery.

Q Have you and your associate Mr. Cohen ever published

any advice to the bar giving your mental thoughts on how to protect video games and products similar to it, from counterfeiting and simulation?

A Yes, we distributed a paper at some meetings of attorneys; recently--this year.

Q I show you Defendant's Exhibit 3 for identification, which is Protection of Product From Counterfeiting and Simulation by A. Sidney Katz and Eric C. Cohen.

MR. BODE: Do you have a copy?

MR. REUBEN: Yes, I do. I thought they might have given you one.

MR. BODE: You should realize that I am innocent of any knowledge of this esoteric subject.

MR. REUBEN: Spare me from innocent lawyers.

BY MR. REUBEN:

Q Do you give your trial strategy and considerations of how to handle these cases in that pamphlet?

A No. You mean with respect to those that were discussed with Mr. Maher at the meetings?

Q No, I am just talking generally. Do you share with people--

A Some things.

Q Now, did you know Mr. Maher as a trial lawyer at all?

A No. By "a trial lawyer", you mean was I aware

that-- Q You have answered my question.

A Well, I didn't understand it.

Q You don't understand what a trial lawyer is?

A I did not know what "do you know him as a trial lawyer"; I only knew him in connection with the Association.

Q Okay.

Now, on October 15th, was Marshall Burmeister there?

A I believe so.

Q He is a lawyer, is he?

A Yes.

Q And he was representing Taito America Corporation.
Is that a competitor of Midway Bally?

A Yes, I believe so.

Q And Melvin M. Goldenberg representing Williams,
right?

A That's right.

Q And he is a lawyer.

A That's right.

Q J.-- David Schoenberg, representing Stern Electronics.

Is he a lawyer?

A I believe so.

Q And does Stern compete at all with Midway Bally?

A Yes. They are also license.

Q And Bennett Shulman, representing Destron, Incorporated;

he is a lawyer?

A Right.

Q Now, in your representation of Bally, has it come to your attention that on a number of occasions, various members of the Association engage in litigation between each other concerning a variety of subjects, including copyright; correct?

A Yes.

Q And that possibility exists at any time while all of these people are in the marketplace; correct?

A That's right.

MR. REUBEN: No further questions, Your Honor.

THE COURT: Any redirect?

MR. BODE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BODE:

Q Mr. Katz, to your knowledge, were all members of the Association competitors of Bally and Midway?

MR. REUBEN: Would you repeat the question?

BY MR. BODE:

Q Were the members of the Association--

THE COURT: I'll get it. Yes, go ahead.

(The last question was read.)

BY THE WITNESS:

A Yes, I believe so.

BY MR. BODE:

Q Did you believe that those competitors had a commonality of interest with Midway for all purposes?

A No.

Q Did you, in October, 1982, believe that they had a commonality of interest with Bally and Midway for some purposes?

A Yes.

Q For what purposes?

A They had a strong commonality of interest for the purpose of obtaining the best copyright protection and enforcement of copyrights in video games, and we regularly cooperated with the attorneys for Williams, for example, in connection with cases that they were working on in the copyright--video copyright area.

We submitted an amicus brief on their behalf with respect to Stern Electronics in their Stern vs. Kaufman case in the Second Circuit. We submitted a brief amicus on their behalf.

We--I was personally present at the trial in--of the Stern vs. Kaufman case in the Eastern District of New York on the preliminary injunction, working with their counsel.

In the Atari matters, we had cooperative investigations with them in connection with matters in New York and California, and perhaps other states.

So that, even though there might be litigation,

for example, between Williams and Bally, in other areas with respect to this issue, their interests were the same.

Q Now, you answered a question of Mr. Reuben with respect to your letter to Mr. Anderson, which was marked as Defendant's Exhibit 2 in the Atari matter, and you answered the question that, if a dispute arose, you would not consider that they were an adverse party on these issues, as you described them in Paragraph 12 of your affidavit. Why did you make that?

A Pardon me. I didn't understand the question. Could you repeat the question. I didn't hear it.

Q All right. You understand--do you recall, you were questioned by Mr. Reuben about Defendant's Exhibit 2, the letter that you sent to Mr. Anderson, and about the possibility of a dispute arising with Atari. And then, Mr. Reuben asked you a question whether, if that dispute arose, would Atari or Witte be an adverse party for purposes of the issues as you stated in Paragraph 12 of your affidavit.

You answered, "no".

I just asked you to explain why.

Q Well, for the simple reason that the issue doesn't involve the copyright protection of video games. I think that there's absolute identity of use and a common interest on that point. It relates to another matter, and that's merely money.

Q Now, Mr. Reuben was asking you some yes or no questions on the subject of the retention of Mr. Turner by the Association. I believe in the course of that, you started to say that you had a conversation with Mr. Maher on that subject. Mr. Reuben did not want to hear about it, so, would you tell us, did you have a conversation with Mr. Maher on the subject of the retention of Mr. Turner by the Association?

A My understanding--yes, I did.

Q And when was that?

A In September of '82.

Q And was it in person or by telephone?

A Telephone.

Q What was said?

A As best as I can recall, he indicated that he was bringing Amedee Turner to Chicago for these meetings. It was--I believe he indicated that there--I don't recall if he indicated if he would be compensated. My understanding was that he was going to be compensated by the Association, for coming; at least for his time and expenses.

That's what I was going to say.

MR. BODE: No further questions.

THE COURT: Any recross?

RECROSS EXAMINATION

BY MR. REUBEN:

Q Did you believe, in September of 1982, that Mr. Maher

had authority to hire a lawyer for the Association without the Association's consent?

A I don't think I had any belief at all at the time, one way or the other.

Q Had your company been a member of the Association long?

A No.

Q How long?

A Since at least May of '82.

Q When they joined, did you read the bylaws or make inquiry about the rights and obligations of members?

A No.

Q When did you first see the minutes of October 14th and 15th, 1982, of the Association?

A My recollection is I saw it within the last month or so-- last two months.

Q Had you seen it before?

A No.

MR. REUBEN: No further questions.

THE COURT: Any further questions of Mr. Katz?

MR. BODE: No, Your Honor.

THE COURT: All right. I have one or two I want to ask Mr. Katz.

Mr. Katz, I could go to the file in this case and get the answers to some of these questions, but could

you tell me what kind of company is Bally, or was Bally, at the time with which we are concerned here? Was it a corporation, or--

THE WITNESS: Bally Manufacturing Corporation, I believe, Your Honor, is the parent corporation, and it has a wholly owned subsidiary, Bally Midway, sometimes just referred to as Midway here. It was originally called just Midway Manufacturing, and then it was recently changed--it had a name change. That's a corporation also.

THE COURT: Bally was a corporation.

THE WITNESS: Right.

THE COURT: Of what state?

THE WITNESS: Delaware, I believe.

THE COURT: The State of Delaware.

THE WITNESS: And the subsidiary company, Bally Midway, I believe is an Illinois corporation; and it's the particular corporation that's in the video game business and owns the copyright, the Pac Man copyright, in the United States and the Western Hemisphere.

THE COURT: All right. Well, the time with which we are concerned here, during that time, then, Midway--you say sometimes it is referred to as Bally Midway, was a wholly owned subsidiary of Bally Manufacturing Company, a Delaware corporation?

THE WITNESS: That's right.

THE COURT: Mr. Reuben just asked you a question that I wanted answered, and you said that you had never seen the bylaws of the Amusement Device Manufacturers Association.

THE WITNESS: I don't recall having seen them, Your Honor.

THE COURT: Well, do you know whether, under the bylaws of that Association, membership of a corporation brings into membership all of its subsidiaries; do you know?

THE WITNESS: I don't know, Your Honor.

THE COURT: Well, just to test the matter, supposing-- and I don't know whether it does or not--by the way, is there a set of those bylaws here?

MR. REUBEN: Yes, I think we have a set.

THE COURT: All right. Let us look at the bylaws.

Could someone look at that and see if my question is answered somewhere there? And by the way, can the parties stipulate for the purpose of this proceeding that a corporation that is a parent of subsidiaries is a corporation in its own right and the subsidiaries are corporations in their own right? Am I not correct about that, just as a fundamental of corporation law?

MR. BODE: Yes, sir, Your Honor.

THE COURT: All right. Well, then, let us find out if, under the bylaws of this Association, membership of a corporation makes all of the subsidiaries members.

MR. REUBEN: It does not. Section 2 here says:

"Only members who are manufacturers shall have voting rights referred to hereunder as voting members. Members who are suppliers shall be associate members and shall have no voting rights."

MR. BODE: In other words, I have not seen the bylaws, Your Honor, but they are apparently silent on this. However, at the appropriate time, I have a Second Circuit case on this--

THE COURT: Well, I will listen to you on the law. Let us first find out what the facts are.

MR. BODE: All right.

THE COURT: Well, going back to when Mr. Maher called you, that you described in your direct testimony, was that the first time Mr. Maher had been in touch with you in his role as the attorney for the Association?

THE WITNESS: Yes, that's my best recollection.

THE COURT: Now, at that time, do I understand correctly, that you were the lawyer for Bally and you were also the lawyer for all of Bally's subsidiaries?

THE WITNESS: Not all, but at least Midway and a number of others in the intellectual property area. We were outside counsel with offices here in the Loop.

THE COURT: Now, that brings me to the other question I wanted to ask you.

Do I understand correctly, then, that when you represented the parent corporation, Bally--when you were retained--you and your office were retained to represent the parent corporation, they made it clear as to which of the subsidiaries you represented?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. Am I right that Bally, the parent corporation, had and has a number of subsidiaries?

THE WITNESS: Yes.

THE COURT: So that, your representation of Bally did not include representing all of Bally's subsidiaries?

THE WITNESS: Not automatically.

THE COURT: Not automatically, because--

THE WITNESS: They provide--they instruct us as to which matters, for which subsidiaries we worked.

THE COURT: Now, in what--when Mr. Maher called you to come to this meeting, and you left your office to go there, did you have a clear understanding, either from what he said or what he suggested, whether you were going there to represent Bally or whether you were going there to represent Bally and all the subsidiaries of Bally that you represented? Which one was it?

THE WITNESS: Bally and all the subsidiaries that I represented.

THE COURT: Well, all right.

THE WITNESS: Particularly in the video game area.

THE COURT: All right. And that included Midway?

THE WITNESS: Oh yes, definitely.

THE COURT: All right. If I have opened up any area of inquiry, first counsel for the plaintiff.

MR. BODE: I think, Your Honor, we really would like to ask just one question on that particular period.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. BODE:

Q Mr. Katz, you described the program of the Association with regard to copyright protection in suits--

A Pardon me?

Q --suits against infringers and copyrights--copyists-- of video games. Did the litigation in which you cooperated as a part of that program, involve Bally, subsidiaries, or both?

A Both. I believe that they involved both.

Q And how about the other members of the Association, when you were cooperating with respect to litigation that they were in; did that always involve as the sole named party, the entity that was the named member of the Association?

A I don't know.

MR. BODE: That is all I have, Your Honor.

THE COURT: All right. Any further questions?

All right. Thank you, Mr. Katz.

(Witness excused.)

Anything else from the movants?

MR. BODE: Yes; Your Honor, I have two more short witnesses. One is Mr. Braswell.

THE COURT: All right.

MR. BODE: The Executive of the Association.

THE COURT: Call Mr. Braswell.

(Witness sworn.)

THE CLERK: Be seated please. State your name and spell your last name for the record. Lean forward; speak to this microphone and keep your voice up.

THE WITNESS: My name is Glenn Braswell, B-r-a-s-w-e-l-l.

GLENN BRASWELL,

called as a witness on behalf of the movant herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BODE:

Q What is your occupation?

A I am Executive Director of the Amusement Game Manufacturers Association.

Q And how long have you held that position?

A Since May of 1982.

Q Your affidavit says, "May, 1980". How does that

happen?

A I apologize for that. That is a technical--a typo error. We were having some static problems with our word processor and that was a mistake.

Q But it should be 1982?

A Should be 1982, yes, sir.

Q Now, how long have you been in the Trade Association?

A Since 1970.

Q And are you a member of the bar?

A Yes.

Q And have you served as counsel for trade associations?

A Yes.

Q What trade associations?

A The United States Brewers' Association.

Q Now, in directing your attention to the year 1982 and particularly, the period from May through December 1982, was the Association engaged in any kind of program relating to the subject of copyright protection of video games and actions against infringers?

A Yes.

Q And what was that program?

A It was a program whereby the members, through the forum of the Association, were trying to share experiences in terms of how we might pursue the protection of and the establishment of the copyrightability of video games.

We did that through a series of meetings in which the members participated in sharing information and experiences in the protection of copyrighted materials, particularly video games.

Q And did the Association have a position as to whether the audiovisual aspects of video games should be protectable by copyrights?

A Yes, it did.

Q And what was that position?

A The position was that we--

MR. REUBEN: Your Honor, I am just going to object to the relevance. I do not think Pac Man involves whether or not--the Pac Man case before Your Honor, as I have heard the testimony from Mr. Katz--involved whether or not video games are copyrightable. I do not see the relevance.

It is a question of whether a game infringes that is a dispute that can happen between any two manufacturers.

MR. BODE: Your Honor, that is argument; but the question was the audiovisual aspects of video games, their copyrightability, and that is the precise subject, as Mr. Katz testified, in this litigation.

THE COURT: I will overrule the objection. He can answer.

BY THE WITNESS:

A The position of the Association was that audiovisual

works, vis-a-vis video games, should be protected as a copy-rightable product, and it was our program to execute the protections of those copyrights.

Q Now, did Mr. Maher hold a position in or with the Association in May through December, 1982?

A Yes.

Q And what was that position?

A He was general counsel to the association.

Q And you have described this program with respect to copyright protection and pursuit of infringers. Did Mr. Maher have a role in that program?

A Yes.

Q And what was that role?

A His role as general counsel was--he was present--or was to be present and was present at several meetings regarding the program to be designed and implemented by the Association on behalf of its members and for the benefit of its members. It was his role as legal counsel to act as a coordinating or a central clearing house for certain information being developed between and among the members of the Association for the protection of the copyrightability of video games.

Q And, in connection with that program, who did you consider Mr. Maher to be representing?

A Well, while he was general counsel of the Association, he obviously represented the Association. But, he also repre-

sented the members of the Association as a service to the members through the Association in the execution of these programs.

Q Now, let me just show you what has been marked, or attached, rather, to Mr. Katz's affidavit as Plaintiff's Exhibit F and purporting to be minutes of meetings in Chicago, October '14 and 15, 1982, and ask you if those are the minutes of the meetings that took place on that day--on those dates, I am sorry.

(Document tendered.)

A Yes, I think these are the minutes of that meeting.

Q Do you consider minutes such as those confidential or public?

A Confidential within the membership; not the public at large. Minutes of a meeting such as this would normally be distributed to the members of the Association, but not beyond the list of members.

Q In 1982, was there any kind of retainer or association between Mr. Amedee Turner, who was at this October meeting, and the Association?

A You mean relationship in terms of the Association and Mr. Turner?

Q Yes.

A There was a relationship, in that the Association had agreed to pay certain expenses for his travel to this

country to enter in discussions to see if there might be a relationship with Mr. Turner. In doing that, the objective was to chat with Mr. Turner and see what services he may be able to render to us in the European community and at the same time, to provide Mr. Turner with certain information about this industry, which may be helpful to him in representing the interests of the members of the Association in his work in the European community.

So, while there may never have been entered into a formal, economic relationship, there certainly was a substantive relationship, at least for this one trip, for which the Association did pay the expenses.

Q And what was the contemplated relationship that was being considered? You said a relationship was being considered.

A Well, it was being considered that he may represent the interests of--he being Mr. Turner--may, at some point in the future, represent the interest of the members collectively as to the protection of copyright of video games in the European community.

MR. BODE: I have no further questions, Your Honor.

THE COURT: Cross examination, Mr. Reuben?

CROSS EXAMINATION

BY MR. REUBEN:

Q Mr. Turner has never acted as a lawyer for the

Association, has he?

A Not to my knowledge.

Q Mr. Turner has influence, in his capacity as a member of the European Parliament, in what will be the new proposed legislation in Europe relating to video game protection; correct?

A I am told that. I dont know that, but I am told that.

Q And so, in that official capacity, he could not represent the Association, could he?

A I was told that he could, that in that community, they did not have the kinds of conflicting questions arising that we may have in this country.

Q Were you told--

A We raised that question, and we were told that that was not a problem in this situation.

Q Were you told that it would be all right under American law as well?

A No.

Q You are a lawyer, are you not?

A Yes.

Q Well, you are familiar with the Foreign Corrupt Practices Act, are you not?

A No. Never heard of it. I have heard of it, but I am not familiar with it.

Q Did you read about Lockheed being indicted in this country for paying officials in a foreign country?

A No.

MR. BODE: Your Honor, I know this is cross examination, but this just seems to be threatening the witness with some other statutes.

THE COURT: Well, the witness has answered the question. Let us go ahead.

BY MR. REUBEN:

Q Did you ever have a conversation with Mr. Maher on this subject of Mr. Turner's status?

A Yes.

Q Do you recall that conversation?

A Yes.

Q And when did it occur?

A I would say the first one occurred about June of 1982; and a subsequent one occurred, oh, September of '82.

Q Tell us, where was the September conversation?

A In our office in relation to a board meeting at the Association.

Q What was said at that time?

A Well, I don't remember verbatim, but the objective was to have Mr. Turner meet with representatives of the members in an attempt to determine whether or not some relationship may be possible between Mr. Turner and the Association and/or

the members of the Association, vis-a-vis the impending drafting, if you will, of some legislation in the European community.

Q Did you ever have a subsequent conversation with Mr. Maher about--

A Subsequent to September?

Q --about Mr. Turner?

A Only regarding, I think, there were some written conversations about the expenses involved, but not about the relationship, no.

Q Did you ever have a conversation between September-- prior to October 14th, 1982, where Mr. Maher told you that it was improper, in light of Mr. Turner's position in the European community, to engage his services by the Association?

A I'm not sure Mr. Maher told me that on October 14th, that it was improper. And I did not have any subsequent conversations about Mr. Turner, except for the matter of expenses.

Q And prior to October 14th?

A Prior to October 14th, the two that I mentioned, June and September.

Q You recall no others?

A No.

MR. REUBEN: That is all.

THE COURT: Any further questions of Mr. Braswell?

MR. BODE: No, Your Honor.

THE COURT: I want to ask Mr. Braswell a question.

Mr. Braswell, does this Association maintain a list of its members?

THE WITNESS: Yes, it does, Your Honor.

THE COURT: And, the members pay a membership dues or fees?

THE WITNESS: Yes, Your Honor.

THE COURT: Is the amount of the dues or fees determined by something like the size of the corporation or--by the way, all of them are corporations, are they not?

THE WITNESS: Not necessarily, Your Honor.

THE COURT: Some individuals?

THE WITNESS: Some are individual proprietors, yes.

THE COURT: How are the dues determined? How do you determine how much each member pays as dues?

THE WITNESS: They are based on categories of gross sales determinations, ranges, if you will; and if your gross sales for your company or operation fall within that range, you pay the dues assessed to that range of gross sales.

THE COURT: Either by custom, practice, usage, or interpretation of your bylaws, does the membership in the Association include subsidiaries or companies owned by the individual?

THE WITNESS: Subsidiaries or companies owned--

THE COURT: Well, let me give you an example.

THE WITNESS: Okay.

THE COURT: Let us take Corporation A--

THE WITNESS: Okay.

THE COURT: --has 20 subsidiaries.

THE WITNESS: Yes.

THE COURT: Does the membership of Corporation A in the Association include those 20 corporate subsidiaries?

THE WITNESS: No, not necessarily. It may include it as to its operation of one of those subsidiaries, but not as to all 20, inclusively. That's not the philosophy of this Association.

THE COURT: Well, when you hire a lawyer to represent the Association, the lawyer is shown or given a list of your membership, is he not?

THE WITNESS: Yes. Or it is accessible to him.

THE COURT: It is accessible to him.

THE WITNESS: Yes.

THE COURT: And for him to ascertain who he represents, he looks at that list; is that right?

THE WITNESS: That is correct, within the bounds of the bylaws, which, in the case that you have, as you say, Your Corporation A, with multiple interests in the marketplace. It is very clear within our bylaws that, even in those instances, our interests and expectations and representations through

this trade association are on a very well defined, narrow, activity of those multiple interest corporations.

For instance, our bylaws state that we are involved in the activities for the amusement only game business; and if you had someone else, say Corporation A in your instance, who held a subsidiary who was in the amusement only game industry, and held another subsidiary who was, let's say, in the farm implement supply business, we certainly, through this Association, would not have any interest in the farm implement supply business.

But, even though the parent corporation may be the member, it's, vis-a-vis, the interest with the amusement only game business.

If that answers your question.

THE COURT: That would include subsidiaries in that business.

THE WITNESS: That is correct.

THE COURT: But is that in your bylaws?

THE WITNESS: Yes, the definition is in our bylaws.

THE COURT: All right.

If I have opened any area of inquiry of Mr. Braswell, first counsel for--

MR. BODE: I have no further questions, Your Honor.

THE COURT: All right.

Mr. Reuben?

All right, thank you.

(Witness excused.)

THE COURT: Your next witness.

MR. BODE: Judge, we have one more witness, Dr. Keane.

THE COURT: All right, have him come forward.

MR. BODE: Your Honor, Mr. Braswell wants to catch a plane, Your Honor.

THE COURT: Unless someone wants him. You may wait, Mr. Braswell.

(Discussion off the record.)

MR. BODE: Would you step forward and take the stand?

(Witness sworn.)

MARTIN KEANE,

called as a witness by the movant herein, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BODE:

Q State your name?

A Martin Keane.

Q Spell it.

A K-e-a-n-e.

Q And what is your occupation?

A I am the Vice President and Director of Technology for Bally.

Q And did you hold that position on August 14, 1982--

MR. REUBEN: October. October.

MR. BODE: I am sorry.

BY THE WITNESS:

A Yes, I did. .

MR. BODE: Saturdays are not good.

BY MR. BODE:

Q October 14, 1982?

A Yes, I did.

Q Now, on that date, did you attend a meeting with respect to the activities of the Amusement Device Manufacturers Association?

A I did.

Q We call that "Association" for short.
And, at whose invitation did you attend that meeting?

A I was invited by Glenn Seidenfeld.

Q Could you identify Mr. Seidenfeld for the record?

A He is the Vice President and General Counsel for Bally, I believe.

Q And did Mr. Seidenfeld tell you the purpose of this meeting?

A Yes, he did.

Q What did he say?

A Obtaining copyright protection for the members of the industry as a whole.

1 Q And where was the meeting held?

2 A It was held in the office of Reuben and Proctor,
3 in Dave Maher's office, I believe, but I am not certain of
4 that.

5 Q And about how long did it last?

6 A It consumed most of the day.

7 Q Who was there, that you know?

8 A There was myself, Mr. Katz, Mr. Maher, there were
9 two representatives of Destron, and I believe one of Sega.

10 Q Those were members of the Association, as far as
11 you know?

12 A Yes.

13 Q And what was your perception of Mr. Maher's role
14 in that meeting?

15 A It was my understanding that Mr. Maher was the
16 general counsel to the Association, and that he was going
17 to, essentially, guide this effort in obtaining copyright
18 protection.

19 Q And what is your understanding as to who he represented?
20 MR. REUBEN: Objection, having been asked and
21 answered--or, I will withdraw that.

22 THE COURT: All right. Go ahead.

23 BY THE WITNESS:

24 A He represented the members of the Association.

25 BY MR. BODE:

1 Q Now, would you tell us what happened during this
2 meeting, and, in particular, what you said during the meeting?

3 A I attempted to educate Mr. Turner as to the varieties
4 of copying of games that had occurred in the past. Very
5 briefly, I indicated to him that there were four levels of
6 sophistication in copying. Explained to him what those levels
7 were.

8 Then, because it became apparent to me that much
9 of what I was saying was going over Mr. Turner's head, we--Mr.
10 Katz called his office and had a Pac Man board sent over,
11 and I used that as a prop and pointed to various of the items
12 that I was referring to on that board.

13 I don't know the chronology, but, in addition to
14 this, I did describe to Mr. Turner the process that we employed
15 in evolving a game from, oh, a rough three sentence sketch,
16 through a final video product that is put on the street and
17 sold.

18 Q Now, during this meeting, was what you said--were
19 you guarded in what you said?

20 A Not at all.

21 Q Why?

22 A I assumed that I was among people who were our
23 allies and whose interests were coincidental with ours.

24 Q And if you had known that someone was there who
25 was an opponent of Bally and Midway with respect to the copyright

on Pac Man, would you have talked as you did?

MR. REUBEN: I think I have been pretty good--
this is leading a little bit.

THE COURT: Yes; but because of the nature of these
proceedings, I will overrule the objection.

Let us have the doctor tell us what--

BY THE WITNESS:

A I think that if I thought there were anyone there
that were in any way adverse to our interest--it's unlikely
that I would have said anything at all. I might have come
and been an observer.

I surely would not have even mentioned Pac Man,
had I been aware that somebody who was against our interest
in anything relating to Pac Man was present.

MR. BODE: I have no further questions.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. REUBEN:

Q Were there engineers or technical people there
from a company called Destron?

A I believe that one of the people from Destron was
in engineering.

Q Is Destron a competitor of yours?

A Destron is in the coin machine business, and I
believe it is a competitor.

1 Q That would make them a competitor?

2 A Yes.

3 Q And are you always--are you not always guarded
4 about giving any secret information to your competitors?

5 A Any information that I feel that they didn't have
6 already, or that they couldn't easily obtain, I would be
7 guarded; yes.

8 Q Anything confidential, you would be guarded about;
9 would you not?

10 A Sure. Yes.

11 Q And did you understand at that meeting that Mr.
12 Turner was representing the Association?

13 A Yes.

14 Q Who told you that?

15 A Gee, I don't know that I can identify a single
16 individual as having told me that. Perhaps it was just a
17 tacit assumption.

18 Q That he was the lawyer?

19 A That--yes.

20 MR. REUBEN: No further questions.

21 THE COURT: Anything else?

22 MR. BODE: No.

23 THE COURT: Thank you, Dr. Keane.

24 (Witness excused.)

25 Your next witness?

1 MR. BODE: Your Honor, we have no further witnesses
2 and would merely like to offer into evidence the affidavits
3 that have already been submitted, and also--

4 THE COURT: Why do you not mark those. For the
5 purpose of this proceeding, mark them as Exhibits so we have
6 a record of these proceedings.

7 MR. BODE: All right. I would like to mark--and
8 as I said, also the Exhibits, so I would like to designate
9 the Exhibits to Mr. Katz's affidavit--

10 THE COURT: Let me ask you--

11 MR. BODE: --by the same designations that they
12 were given on the affidavits.

13 THE COURT: We will take a short recess.

14 Could you and counsel for the opposing parties
15 look over the Exhibits, mark them and make them part of the
16 record of these proceedings.

17 We have respondents. I have designated them as
18 Respondents' Exhibits--is it 1, 2 and 3?

19 MR. REUBEN: 2 and 3, Your Honor.

20 THE COURT: 2 and 3. And get them together and
21 offer them.

22 MR. BODE: Fine.

23 MR. REUBEN: I do not think there is any objection,

24 Your Honor.

25 THE COURT: Let us take a short recess now.

1 (Brief recess.)

2 THE COURT: And what are the Exhibits now, tell
3 me?

4 MR. BODE: Your Honor, they are Plaintiff's Exhibits
5 A through P, inclusive.

6 THE COURT: All right.

7 MR. BODE: Of those, A through K were the Exhibits
8 to Mr. Katz's affidavits.

9 THE COURT: All right. And no objections?

10 MR. REUBEN: None.

11 THE COURT: They are admitted in evidence.

12 (Whereupon, said documents, previously marked as
13 Plaintiff's Exhibit Nos. A through P, inclusive,
14 for identification, were received in evidence.)
15 Would you give those to Mr. Grice so I can look

16 at them?

17 Any further evidence in support of the movant?

18 MR. BODE: No, Your Honor.

19 THE COURT: All right. The movant rests.

20 MR. BODE: Yes, Your Honor.

21 THE COURT: Mr.--

22 MR. REUBEN: I have one witness, but I will put
23 in--they have not been identified yet--Defendant's 2, which
24 is the Welshand Katz letter which is done by Katz.

25 THE COURT: All right.

1 MR. REUBEN: Defendant's Exhibit 3, which is Mr.
2 Katz's Protection of Products From Counterfeiting and Simulation,
3 written by Mr. Katz and Mr. Cohen.

4 THE COURT: All right.

5 MR. BODE: No objection, Your Honor.

6 THE COURT: They are admitted in evidence.

7 (Whereupon, said documents, previously marked as
8 Defendant's Exhibit Nos. 2 and 3, for identification,
9 were admitted in evidence.)

10 THE COURT: You may stand and be sworn.

11 (Witness sworn.)

12 THE CLERK: Be seated please. State your name
13 and spell your last name for the record. Lean forward; speak
14 to this microphone and keep your voice up.

15 THE WITNESS: My name is David Maher, M-a-h-e-r.

16 DAVID MAHER,
17 called as a witness by the respondent herein, having been
18 first duly sworn, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. REUBEN:

21 Q You are a member of the bar and formerly general
22 counsel for the Amusement Association; correct?

23 A That's correct.

24 Q How long have you been general counsel?

25 A From about April 1981 until December 31, 1982.

1 Q Now, would you briefly describe to his Honor your
2 duties in that position?

3 A Well, the principal duty was to keep the members
4 of this trade association from getting into antitrust difficul-
5 ties. The members were, of course, all competitors, and
6 very energetic competitors in the amusement--coin operated--
7 amusement game field. Not only that, I learned immediately
8 when I became the counsel to the Association that many of
9 the members were litigating against each other, so that my
10 first concern was to prevent any antitrust violation by exchange
11 of information that might be improper.

12 In addition to that, I also acted as a coordinator
13 for exchanging new legislation, court decisions, other court
14 filings that would be of interest to all the members, and
15 I was in charge of the corporate aspects of the trade associa-
16 tion.

17 Q Do you know a man named Turner that has been described
18 here as an English barrister?

19 A Yes, I am. Amedee Turner is an old friend of mine,
20 whom I have known for more than 20 years. He is a barrister
21 in London, one of the very few barristers who specializes
22 in intellectual property matters, and I also knew that he
23 had been elected a member of the European Parliament.

24 Q And what is his function at the European Parliament?

25 A Well, he is a regular voting member, representing

1 a group of counties in England. But his particular function,
2 as I learned, he was the raporteur of the European Trademark
3 act. And he is the only member of the Parliament who is
4 a lawyer in the intellectual property field.

5 Q Did you have a conversation with anybody at the
6 Association about inviting Mr. Turner to the United States?

7 A Yes.

8 Q And who was that person?

9 A I discussed it with Glen Braswell.

10 Q When?

11 A Well, on several occasions.

12 Q When was the first?

13 A Probably in June, 1982, and then, until Turner
14 appeared over here.

15 Q Well, what was the first discussion?

16 A Well, the first discussion was the question of
17 bringing a European expert over to discuss questions of copy-
18 right, trademark, patent law with members of the Association,
19 and I had suggested at a board meeting of the Association
20 that I had a friend in England who would be ideal for this
21 job. He could--he was a patent barrister and he knew the
22 field.

23 Q Was he coming over as a lecturer, or a lawyer,
24 or what?

25 A Well, as--he was coming primarily to lecture and

1 that-- the board, in September of 1982, approved the project
2 of bringing him over to lecture to the members on the status
3 of European law and the interrelationships of U. S. and European
4 copyright law, in particular.

5 Q Did you ever, prior to October 14, 1982, have a
6 conversation with Mr. Braswell concerning the employment
7 as a lawyer of Mr. Turner?

8 A Yes. One of the conversations that I had with
9 Braswell, I believe in September of 1982, concerned the problem
10 of the Association dealing with the very person in the European
11 Parliament who was drafting legislation. And I raised it
12 by saying, in very blunt terms, we cannot be in the position
13 of paying money to a government official who is going to
14 be writing legislation. And I cautioned him that that would
15 be a problem that we would have to deal with; but that I
16 thought, after talking to Turner and thinking it over that
17 we could bring him in simply to give his views and report
18 to the committee--or report to the assembled meeting and
19 discuss European and American copyright law.

20 Q Did you have a subsequent conversation, prior to
21 October 14th, but after this one you just testified to?

22 A Well, Braswell and I spoke to each other frequently
23 on the telephone and, as I recall, at some point, prior to
24 the October meeting, I told Braswell that we could not hire
25 Turner as the Association's lawyer. We would simply have

1 to treat him as a guest expert who would come to discuss,
2 lecture, give his views.

3 Q To your knowledge, as he ever hired by the Association?

4 A Not to my knowledge.

5 Q Mr. Maher, on October 14th and 15th, do you believe
6 that you received as a lawyer any confidential information
7 from your client?

8 A As far as I am concerned, I received no confidences
9 at all.

10 Q Mr. Katz, in his testimony, referred to a July 20th
11 meeting or a July meeting, do you recall that?

12 A Yes, there was a meeting in July that was, in effect,
13 a similar meeting, although the focus was on specifically
14 the International Trade Commission and one of the participants
15 was a government attorney from the ITC.

16 Q The U. S. government?

17 A The U. S. government attorney.

18 Q Another nonmember of the Association?

19 A That's correct.

20 MR. REUBEN: No further questions.

21 THE COURT: Cross examination?

22 CROSS EXAMINATION

23 BY MR. BODE:

24 Q Mr. Maher, you have, besides your antitrust role--you
25 were the only counsel for the Association in May through

1 December, 1982; is that true?

2 A Yes, the only counsel. Our firm was the counsel,
3 I was the partner in charge.

4 Q Now, you did discuss with Mr. Braswell the idea
5 of the Association retaining Mr. Turner; is that not right?

6 A That's correct.

7 Q And that was discussed--

8 A Oh, I--excuse me. The--I discussed with Braswell
9 the idea of bringing Turner over and the question of retaining
10 was part of that.

11 Q And that was discussed more than once?

12 A Yes.

13 Q If Mr. Turner had returned to London and published
14 a close to verbatim account of what happened at the meetings
15 of October 14 and 15, would you think that there was no problem
16 at all in his doing that?

17 A Well, it would be the same kind of problem of relating
18 any private discussion, as opposed to, I think all lawyers
19 have--if I tell you about a marital problem, and you are
20 not my lawyer, I assume you are not going to send a letter
21 to the Tribune about it. Similarly, I wouldn't expect Turner
22 to talk about private matters that way.

23 That is as opposed to legal confidences.

24 Q All right. But, anyway, you have answered the
25 question. You would not expect him to do that.

1 Now, in this period in 1982, the Association was
2 conducting a program with regard to enhancing the copyright
3 protection of video games, is that not right?

4 A Yes.

5 Q And it was a program aimed at dealing with copyists
6 and infringers; right?

7 A That is correct.

8 Q And, in fact, after video games had become popular,
9 there were a lot of people who started coming out with copies;
10 is that not right?

11 A That's correct.

12 Q And that was a problem for all of the members of
13 the Association; is that not right?

14 A That's right.

15 Q And it was a problem as to which they shared a
16 common interest in dealing with it; is that not right?

17 A Yes.

18 Q And in fact, pursuant to that common interest,
19 you convened meetings; did you not?

20 A Yes.

21 Q And you exchanged materials with attorneys and
22 people in the membership; right?

23 A At the direction of the Association, yes.

24 Q And also, some of the members filed amicus briefs
25 in proceedings involving other members in support of their

1 copyright position; is that right?

2 A Yes, I was aware of one or two.

3 Q Now, did you--you have heard Mr. Katz testify and
4 did you in fact approach him sometime early in 1982 and ask
5 him to come to a meeting with regard to this problem?

6 A Yes. I first talked to Mr. Katz and I believe
7 it was in February of '82 to alert him to a meeting of the
8 attorneys for the various members and other representatives
9 of the members, to discuss copyright issues in video games.
10 So, that was before Bally was a member of the Association.

11 Q Did you tell him that this participation on his
12 part was in the interests of all the members of the industry?

13 A Well, yes, that was implicit that this was an industry
14 meeting.

15 Q All right.

16 Now, you have looked, have you not, at Exhibit
17 F, which is the minutes of the October 14, 15, 1982 meetings?

18 A Yes.

19 Q Is that, in fact, a copy of those minutes?

20 MR. REUBEN: He has not seen them.

21 THE WITNESS: I suppose I'd better take a look
22 at it to be doubly sure.

23 MR. BODE: I made the same assumption, I guess,
24 that Mr. Reuben did about my knowledge of Mr. Katz's art.
25 (Document tendered.)

1 BY MR. BODE:

2 Q While you look at those, my next question will
3 be whether the description of the events contained in those
4 minutes is accurate.

5 A These appear to be a copy of the minutes of the
6 meetings.

7 Q And are the descriptions of the meetings contained
8 in those minutes accurate?

9 A As I recollect them, yes.

10 Q Did you have something to do with the preparation
11 of those minutes?

12 A I drafted them.

13 Q And you were the person who set up the October
14 14 and 15 meetings, is that right?

15 A At the instructions of the Association, yes, I
16 invited the participants.

17 Q You invited Mr. Katz?

18 A Yes.

19 Q Did you have something to do with the presence
20 of Dr. Keane?

21 A No. Not directly. I spoke to many of the members
22 and for the October 14 meeting, I wanted to have as many
23 technical people from different companies available as possible.
24 Many of the members are located in the Chicago area, and
25 I was hoping to get people from Williams, Rockwell and so

1 on. In fact, Dr. Keane and the two men from Destron were
2 the only--as I recall--the only two technical people who
3 did appear.

4 Q Well, you took steps--took some steps to arrange
5 for-- or to invite somebody from Bally in a technical capacity
6 to this meeting?

7 A Well, I spoke to Sid Katz as to Mel Goldenberg
8 and George Gerstman and everyone else, saying, "We would
9 like to have a technical person--" as a matter of fact, I
10 think one was supposed to show up and didn't.

11 Q Now, at these meetings on October 14 and 15, would
12 you not say that Mr.--Dr. Kesane and Mr. Katz taken together,
13 spoke as much as Mr. Turner did?

14 A Could you repeat that for me?

15 MR. BODE: Let us see how it came out.

16 (The last question was read.)

17 BY THE WITNESS:

18 A No.

19 BY MR. BODE:

20 Q You would not?

21 A No.

22 Q Would you describe the format of these meetings?
23 Was Mr. Turner lecturing and everyone else sitting there
24 all day listening to him?

25 A Well, there were two days.

1 Q Yes.

2 A And the October 14 meeting was certainly not a
3 lecture by Amedee Turner. It was a smaller meeting and there
4 was more give and take.

5 On the 15th, it was pretty close to a lecture.
6 Amedee, a barrister and member of Parliament, stood up and
7 it was like talking to his constituency, in a way. He lectured,
8 yes.

9 Q On the 14th, most of the discussion was not by
10 Mr. Turner, is that right?

11 A Well, there was a lot of give and take. It was
12 not exclusively--the people from Destron participated; Crane,
13 the lawyer from Sega got in the act. I said some things.
14 It was--I think the minutes show that. It was--

15 Q But the answer to my question is, it was not mostly
16 Mr. Turner on the 14th?

17 A No.

18 Q Now, in the meeting on the 14th, did Dr. Keane
19 discuss the steps in the evolution of a game?

20 A I'd like to take a look at the minutes.

21 Q Sure.

22 A I think that's --

23 Q Sure.

24 A --correct.

25 That was--I think Dr. Keane--and again, I remember

1 the Destron people joining in at--from their experience with
2 the games they made.

3 Q On the 14th, did Dr. Keane discuss the various
4 levels-- perhaps four levels--of types of copying that were
5 occurring and were problems?

6 A Well, we--according to the minutes--and this is
7 as I recollect it--it was the stages of development. It
8 was suggested that the process may be viewed as involving
9 four stages.

10 Q The answer is yes?

11 A Well, I remember what the minutes said.

12 Q Did Dr. Keane take a prominent part in that discussion?

13 A Prominent, yes. As did the others.

14 Q Okay.

15 Now, was there a--was the--on the 14th, was the
16 subject of Pac Man brought up as an example?

17 A I don't remember it specifically, but I think it
18 was.

19 Q Well, perhaps you will remember this: did Mr. Keane
20 send for and use a Pac Man circuit board as a prop and as
21 an example in describing and explaining something in that
22 meeting?

23 A Yes, I remember that a circuit board was sent for.
24 I remember that it had a stick on it; as I recall. It was
25 an Exhibit in some lawsuit. It was a circuit board about,

1 say, two feet by two feet, with a maze of the copper and
2 chips. You could have told me it was part of a moon rocket
3 and I couldn't deny it.

4 I believe it was identified as an Exhibit from
5 some Pac Man litigation.

6 Q I guess the answer to my question is yes, is that
7 right?

8 A They said it was from a Pac Man piece, as I recall.

9 Q Yes.

10 All right. Now, Mr. Katz, during these meetings
11 on the 14th and the 15th, discussed some of Bally's and Midway's
12 experiences in their infringement litigation; did he not?

13 A Yes.

14 Q And he discussed, among other things, the problem
15 of fixation, did he not?

16 A Again, I know the subject of fixation came up and
17 I don't see anything specific here on fixation. I don't
18 recall anyone in particular talking about fixation. I assume
19 Sid Katz joined in whatever discussion there was.

20 Q Did Mr. Katz discuss the subject of derivative
21 works and using the theory of derivative works to sustain
22 copyright?

23 A Yes.

24 Q And did not this particular case--this litigation
25 we are here on right now--come up as the subject of conversation

and discussion in the meeting on the 15th?

A Yes, the minutes show that this case was mentioned in that.

Q Mr. Maher, when Reuben and Proctor first consulted to possibly represent any of the defendants in this case?

A The possibility was first raised sometime mid-1982.

Q And did Reuben and Proctor accept or decline the representation at that time?

A We declined.

Q And on what grounds?

A Mainly because we knew Bally would get us.

Q Was it on the ground of conflict?

THE COURT: I did not get that. Bally was what?

THE WITNESS: Bally would get us.

BY MR. BODE:

Q Was it on the ground of conflict?

A No.

Q It was not on the ground that you were acting as counsel for the Association?

A No. It was--the fact that the firm was counsel to the Association--but the reason was not a conflict.

Q But the fact--the reason--but the ground or the basis for declining the representation was because the firm was acting as counsel for the Association; is that right?

A The reason was that we were concerned about the

vindictiveness of some of the members, and--

Q In connection with your representation of the Association?

A In connection with the representation.

MR. BODE: I have no further questions, Your Honor.

THE COURT: Any redirect?

MR. REUBEN: One, Your Honor. I do not want anybody to think you were afraid of being shot at or anything.

BY MR. REUBEN:

Q Mr. Maher, you said there were business considerations for not representing North American Philips back in '82. What was the concern if the firm represented North American Philips? What was the concern as to what would happen?

A Well, that we would immediately be fired by the Association.

Q Did you regard it as a legal conflict that was involved at all?

A No.

Q Did you regard it as a matter of prudence as to keeping business; is that correct?

A That's correct.

THE COURT: Any further questions?

MR. BODE: No, Your Honor.

THE COURT: Let me ask you, Mr. Maher, you have heard the questions I asked the other witness about this

1 membership.

2 Am I being concerned about something that is not
3 important?

4 THE WITNESS: No, Your Honor.

5 THE COURT: Well, when you represented the Association,
6 did you get to know who were the members of this Association?

7 THE WITNESS: Yes. I knew who the companies were.

8 THE COURT: Who were they? I mean, was Bally one
9 of them?

10 THE WITNESS: They joined in May of 1982. They
11 were not one of the original members.

12 THE COURT: Well, when they joined--well, let me
13 ask you this question: I assume there is some kind of applica-
14 tion that a prospective member makes to the Association.

15 THE WITNESS: That's correct.

16 THE COURT: And there's a process, I assume, of
17 some kind, formal or informal, by which the application is
18 considered.

19 THE WITNESS: That's correct.

20 THE COURT: And the applicant discloses it or his
21 identity or her identity, I take it.

22 THE WITNESS: And, what is the scope of the business,
23 the extent of the business. And do they in these applications
24 disclose, say, the number of subsidiaries that the company
25 controls?

THE WITNESS: No. As I recall, the form didn't go into that much detail. It was a relatively simple form which reproduced the bylaw provisions on qualifications for members. And I think, then, just asked the applicant to check a box that said, "What is your gross annual revenues in the field of coin operated amusement devices"; juke boxes, pinball, video, and so on.

THE COURT: There is no disclosure about subsidiaries?

THE WITNESS: I don't recall any.

THE COURT: I thought you were the best qualified person to answer this question. In October of 1982, either from the bylaws, the practice, custom or accepted usage of the Association, was Midway a member of the Association?

THE WITNESS: No, Bally Manufacturing Corporation as the member.

THE COURT: Have I opened up any area of inquiry?

MR. BODE: Yes, Your Honor, I just want to ask something.

RECROSS EXAMINATION

BY MR. BODE:

Q In October of 1982, you knew of the existence of Midway Manufacturing Company; did you not?

A Yes.

Q And that it was a subsidiary of Bally?

A I did.

1 Q And that it was in the video game business?

2 A I knew that.

3 Q Now, Mr. Braswell indicated there is a payment
4 for membership based on unit sales.

5 A Well, gross revenues.

6 Q Gross revenues--in terms of video games?

7 A No, it was gross revenues in the amusement coin
8 operated field, which is juke boxes, pinballs.

9 Q And does a member of the Association reduce his
10 assessment by putting part of his video game or amusement
11 game operation in the hands of a subsidiary?

12 A Well, I don't recall the question ever coming up.
13 As I said, the application form is--the member makes application,
14 checks a box. And I don't recall anyone's honesty being
15 questioned. It was, I believe, implicit that the--as Braswell
16 said--the revenues of subsidiaries in the business were included.

17 Q Were included for that purpose.

18 A Correct.

19 MR. BODE: Thank you. I have no further questions.

20 THE COURT: Any further questions of Mr. Maher?

21 MR. REUBEN: I rest, Your Honor.

22 THE COURT: Thank you, Mr. Maher.

23 (Witness excused.)

24 THE COURT: Could you give me an idea--it is ten
25 minutes to 1:00--how much more time this is going to take?

1 MR. BODE: Well, Your Honor, how do you want to
2 proceed? With arguments?

3 THE COURT: Well, I would like to hear you in summa-
4 tion and then, depending upon how that goes, I will be able
5 to tell you how I am going to rule on this.

6 You are all busy lawyers, you should know. I think
7 this case has--the facts--this simple motion to disqualify
8 is entitled to a memorandum, which I am going to have to
9 take time to write.

10 How much time will the summation take. That is
11 all I want to know.

12 MR. BODE: Ten minutes, Your Honor.

13 THE COURT: All right. Mr. Reuben, how much time
14 will you take?

15 MR. REUBEN: Ten.

16 THE COURT: All right. Let's proceed, then.

17 MR. BODE: Your Honor, let me start out by dealing
18 with the question that you have raised, and--

19 THE COURT: Yes. By the way, I think it is very
20 important in this case. I want to tell you that.

21 You tell me that you have a case, and I would like
22 to see it.

23 MR. BODE: All right.

24 THE COURT: You see, in these cases of lawyer disquali-
25 fication, as you know, this has generated a great deal of

1 litigation in the business litigation in this country, particu-
2 larly in the Federal Courts. Each case is slightly different.
3 And I am just wondering, if you have seen a case like this,
4 where the representation is not only of members, but of members
5 who have members.

6 In other words, it is one more step removed down
7 the line. So, I notice you told me you had a case, which
8 is always helpful. And I always worry about any lawyer--
9 when I practiced law, I always worried about the lawyer who
10 came to Court with a case--

11 MR. BODE: With one case.

12 THE COURT: Yes, that always worried me. If he
13 came with a lot of books, I became suspicious. But, if he
14 comes with a case, I then became very concerned.

15 Now, let us see if--have you seen this case, Mr. Reuben?

16 MR. BODE: It is cited in the brief.

17 THE COURT: A brief? What brief?

18 MR. BODE: It is cited in the briefs in this matter.

19 THE COURT: You mean the memoranda that I received.

20 MR. BODE: That is correct.

21 THE COURT: Well, let me find it. The memorandum--

22 MR. BODE: I guess I need help from my co-counsel

23 who prepared the brief, to find the page--Glueck--

24 THE COURT: Which case?

25 MR. BODE: It is Glueck, G-l-u-e-c-k, vs. Jonathan

1 Logan, Inc., a Second Circuit case.

2 THE COURT: All right. Let me find the memorandum.
3 Glueck. 653. All right.

4 MR. BODE: There is discussion of it on Page 7
5 of the original memorandum, and I am told that it is also
6 discussed at another point.

7 In any event, Your Honor, there is a matter we
8 dealt with in one paragraph, and in fact, it is a footnote
9 in the opinion. And it is Footnote 8. And it is a situation
10 which an objection was raised because--it was also, like
11 Westinghouse, a trade association case. It was one of a
12 couple of cases involving disqualification motions in trade
13 associations, and I guess in that case, the parent, major
14 company, Logan, was the person complaining and seeking the
15 disqualification. And one of its divisions, R & K Originals,
16 was a member of the Association.

17 And the objection was made by the person seeking
18 to resist his disqualification that that difference defeated
19 his disqualification. And the Court said, quote:

20 "We reject, as did Judge Connor, the appellant's
21 contention that disqualification should not occur
22 because Logan's division, R & K Originals, is a
23 member of the Association, rather than Logan, itself.
24 The risks identified by Judge Connor are sufficient
25 to warrant disqualification, even though only Logan's

1 division is a member of the Association. Nor do
2 we accept the contention that it will be unduly
3 burdensome for law firms that represent trade associa-
4 tions to inform themselves of the corporate identity
5 of those members of an Association that are constituent
6 parts of a nonmember corporation."

7 So, I submit that that is my case. And on the
8 facts, I will just state a few things on the facts.

9 With regard to the facts shown that Mr. Maher knew
10 about Midway and that it was in this business; and in fact
11 there is testimony from the Secretary of the Association
12 that they viewed the membership as encompassing not only
13 the parent, but also those--not all the subsidiaries--but
14 those that were in this particular business.

15 There is also the testimony--in fact--that they
16 base their membership fee on gross revenues from this industry
17 and that they included the revenues, as Mr. Maher admitted,
18 from the subsidiaries that were in this--again--in this business.

19 THE COURT: Without identifying--

20 MR. BODE: That is correct.

21 But, in this case, Mr. Maher knew--he knew about
22 this company and that it was a prominent member of the industry,
23 and so there is no unfairness, and indeed, I would submit,
24 on the other hand that--

25 THE COURT: Wait a minute. Let me see if I understand

1 it.

2 MR. BODE: Yes, sir.

3 THE COURT: He knew about what company?

4 MR. BODE: He knew about Midway.

5 THE COURT: But you heard Mr. Maher's testimony
6 that Midway was not a member of the Association, as far as
7 he knew.

8 MR. BODE: But he also said on my examination
9 that he knew about them and he knew that they were in he
10 amusement game business, and that they were a subsidiary
11 of Bally and in the amusement game business.

12 In fact, there was a discussion about these cases.
13 I would say it is not unfair to him, but it is--businessmen,
14 in this type of situation, such as Dr.--I cannot imagine
15 that Dr. Keane came over to talk about this, and that he
16 had in his head whether he--whether what he said was protected,
17 if it was about the business of Bally Manufacturing, but
18 that if he said something about Bally Midway, if Midway was
19 involved, it was not.

20 That is my position about that. I do not believe--
21 I do not ask Your Honor to adopt some broad, general rule
22 on the subject, but I think in this situation that circumstance
23 should not defeat the disqualification motion.

24 Now, let me go on then, to the rest of the case.
25 We started out, said at the beginning, this is

1 essentially a Canon 4 situation in which the Slaughter case,
2 Seventh Circuit, 1976, said that there were two requirements:
3 the existence of an attorney-client relationship with the
4 former client, and that the present representation involves
5 subject matter which is substantially related to the subject
6 matter of the prior representation. That is a substantial
7 relationship.

8 Now, in this case, Westinghouse, and also, this
9 Glueck case in the Second Circuit, have gone into the question
10 of how this applies in the particular area of the trade associa-
11 tion. And, of course, in Westinghouse, they said, it is
12 not just that if you are a lawyer for the trade association,
13 you can never be adverse to any of the members in anything,
14 no matter what it is. But, on the other hand, in the Westing-
15 house case, you will recall that Judge Marshall had come
16 down hard on the idea that the only--the client was the associa-
17 tion and not the members, and they paid the bills and it
18 was an agency. And the Court of Appeals said, no, that is
19 not the test.

20 The test is really, what the perception of the
21 client of the Association member was, and if he had a reasonable
22 perception that the lawyer was acting in a professional capacity
23 as a lawyer during this time for that client.

24 And so then, we have looked into the facts on that
25 at great length and we see that what happened is that this

Association had a problem with infringers and copiers. All the members were interested in getting copyright protection for their video--these elements of the video games--and they entered into a program of exchanging information and working together by filing amicus briefs and other things, to try to develop methods of enhancing that protection, and as Mr. Katz said, to develop favorable precedents, if possible, on that subject.

There were a whole series of things, activities that have been described. Mr. Maher was especially involved in the meetings; and, in particular, of course, he convened these meetings of October 14 and 15, where there were discussions in particular, that Mr. Katz testified, of Bally and Midway's experience in litigation; what problems they had with copying, what they had tried to do to prevent it, what they had tried to do in terms of enforcing copyright rights, what their theories were. I am not well enough versed in copyright law to go into the nuances of those theories, but the idea that--one was this idea of fixation, wherein as the copyrightable element, if you are talking about this type of video game, which is in that subject, not so obvious.

And another question particularly, of derivative works. That is, whether you base your copyright on the physical similarities, or derivative works theory, and also what values you get in the United States on your presumptions that you

1 get from your copyright registration, and how that can be
2 defeated, or what arguments can operate.

3 Mr. Katz discussed the strengths and weaknesses
4 of various strategies on all those points. Dr. Keane also
5 discussed various technical aspects, and they discussed--he
6 discussed his litigation strategy. And this, Your Honor--this
7 case particularly, and specifically, was discussed during
8 those meetings; that is admitted.

9 And this case involves precisely the audiovisual
10 copyright of Pac Man, which came up frequently as an example
11 in those meetings.

12 And it involves many of those various theories
13 of which Mr. Katz discussed the strengths and weaknesses
14 during these meetings.

15 In terms of them, the question is reasonableness--
16 you have to have a reason--Keane has stated--and in fact,
17 Mr. Braswell for the Association--has stated that they felt
18 that in this activity--not generally, and all the time--but
19 in this activity, Mr. Maher was acting for the members, as
20 well as the Association as an entity and protecting their
21 interests in this common project.

22 Now, Mr. Reuben has referred to the fact that these
23 people were--the people in the Association were competitors.
24 Well, of course, that is true in any trade association that
25 I know about, and if that were a ground to defeat it, why

1 the Westinghouse opinion could have been decided in the first
2 paragraph of the opinion.

3 Of course, the fact is, you can be competitors,
4 but you can be still working together on a common project,
5 and that is what the evidence shows what they were doing
6 in this case with regard to copyright protection and against
7 infringers.

8 And Mr. Katz testified in detail and Mr. Reuben
9 said, "Well, weren't you litigating with so and so, litigating
10 with so and so?" And he explained that, even though there
11 was litigation, at the same time, Bally and Midway were filing
12 amicus briefs, and otherwise helping these other companies
13 when it came to this particular area where they had a common
14 type of interest.

15 Now, we have the question of Mr. Turner. I think
16 it is clear. I am not going to belabor it, Your Honor, but
17 I think it is clear from all the testimony and from the minutes,
18 and I urge you to look at the detail of the minutes, which
19 is Exhibit F, that this was not a case of bringing in a CLE
20 lecturer, who lectures for two days. That was not what this
21 meeting was about.

22 And, as Mr. Maher said, we do not know exactly
23 what Mr. Turner's role is. I do not think it is necessary
24 to get down to a finite determination of what it was, but
25 Mr. Katz thought he was retained by the Association.

1 There is no testimony that anybody said that he
2 told these people that he was not. There was discussion
3 of whether he would be retained, and even Mr. Maher said
4 that he would have been surprised and shocked and would not
5 like it if Mr. Turner had turned around and published an
6 account of this meeting, which you certainly could do if
7 you went to a Continuing Legal Education-type of meeting.
8 That just was not what was happening on October 14 and 15.

9 What I have already said, I think also covers the
10 matter of substantial relationship of subject matter. This
11 case, and the subjects that were discussed on October 14
12 and 15 were the same issues. And in fact, Pac Man and this
13 case were also discussed.

14 On this basis, Your Honor, and on the basis of
15 the Westinghouse case, we submit, and are reluctant to press
16 this kind of motion--it has always been an awkward situation,
17 but we submit that Reuben and Proctor should not continue
18 to represent the defendants in this case.

19 I will just add that, since they have just come
20 into the case, which is an old case, there is no indication
21 that their departure will cause any particular prejudice
22 to the defendants.

23 THE COURT: All right.

24 MR. BODE: That is what I have, Your Honor.

25 THE COURT: Mr. Reuben?

1 MR. REUBEN: First of all, thank you, Your Honor,
2 for coming in on Saturday.

3 THE COURT: All right.

4 MR. REUBEN: You are as crazy as we are.

5 THE COURT: I work on Saturdays. My wife will
6 tell you. Even some days on Sundays. Holidays; so I do
7 not think it changes the burdens of the profession just when
8 you go from the practice to the bench. It always remains
9 the same.

10 Go ahead.

11 MR. REUBEN: I want to address myself first to
12 the question Your Honor raised about sub and parent, because
13 we have a very interesting insight into it that may have
14 escaped some people.

15 I asked Mr. Katz if there was anybody on October 14th
16 that he was adversary to and he said, "no". Then I came
17 back later and said, "Say, how about Sega?"

18 Oh, he was not adverse to them, that's why he said
19 no.

20 So, I said, "What about the parent, Gulf and Western?"
21 You see, in his mind, he separated the parent.

22 Then, we heard that there was a difficulty, but
23 he said, "We were friends. We were friends." His brief
24 filed to you described this friendship as the--he said "at
25 no time would the copyrightability of an audiovisual game,

1 the copyrightability of a computer game or the Pac Man video
2 game, the subject of Mr. Katz's disclosures at issue in this
3 case."

4 Then, he says, "Publication in the National vs.
5 Bally involved a dispute regarding publication of two books
6 regarding the Pac Man Game. The protection of video games
7 was never at issue. Further, the lawsuit had nothing to
8 do with Gremlins, Sega, a member of the Association, who
9 is a subsidiary of Gulf and Western."

10 That is why he answered the way he did.

11 In that case, Gulf and Western, the parent, voluntar-
12 ily took a consent judgment. See, he said they were friends,
13 because Gulf and Western caved in, and Mr. Katz and I would
14 walk out of here lockstepped together and be friends if we
15 caved in, and that is what he means by "friends".

16 Now, I think Mr. Katz is a very learned lawyer.
17 But he, and I have a different definition of some words.
18 "Confidentiality" and what is "confidential" is a good example.
19 He is the principal claimant of the disclosure of confidential
20 information. And we saw what he thought was confidential--a
21 press release, an amicus brief. What came out of Mr. Maher's
22 Apple Computer, which my 15 year old kid can duplicate and
23 pull out on his Apple Computer, at a modest cost.

24 We never did hear what was told that was confidential.
25 What we heard was what Your Honor had--has, I am sure, when

1 you talk among your fellow Judges. You discuss the state
2 of the world, the state of the docket; you discuss all sorts
3 of things. We used to call it in service, "shooting the
4 breeze" or "a bull session". It is an interface of profes-
5 sionals in an exchange of ideas. And I do not think that
6 for example disqualifies Your Honor, if you talk about this
7 case with another Judge, or he bounces his ideas off of you.
8 That is what they call dialogue and a learning process, and
9 I am not sure that anybody would choose to say that is privil-
10 eged, or that you cannot be compelled to disclose the things
11 that were said there in an appropriate case, if a Grand Jury,
12 decided as they have in Cleveland to find out what was happen-
13 ing in the Court--the Federal Court.

14 On the other hand, it is private. I do not think
15 you particularly like to have disclosed if you said when
16 you went to lunch on Monday with one of your colleagues,
17 I had that bubblehead Reuben before me on Saturday--it is
18 not something that--and so, there is a distinction between
19 what is private and what we are talking about here, which
20 is confidential information.

21 Now, when you take the scene that is being played
22 out for you here and put it in context, it is really kind
23 of funny. I do not think, Judge, that you have to--when
24 you get on the bench, and as long as I have practiced before
25 you, when you got on he bench, you did not leave behind your

1 experience as a lawyer. And I am sure you remember that
2 when you were a lawyer, every other lawyer you knew was very
3 protective about his client. And I would guess that Mr.
4 Katz is protective about his client. We are protective about
5 ours. We sure do not want anybody else to be giving our
6 client legal advice.

7 And so, Mr. Katz is not going to put himself in
8 a position, as a matter of common sense, where he discloses
9 anything that gives any special advantage to any other lawyer
10 to go deal with his client.

11 In comes Mr. Turner, and I look upon Mr. Turner
12 very much like how we have done so often, for example, in
13 the broadcast business, for instance. They invite the Commis-
14 sioners, the FCC Commissioners down to the National Broadcast-
15 ing Convention. They pay their expenses. Or you invite
16 a Congressman or a Senator to come and speak. You may even
17 pay them an honorarium, which they did not do here, as well
18 as his expenses. And, you can have an off the record meeting
19 on what is happening in government or what an idiot Mr. Reagan
20 is, or what an idiot the Democrats are or what have you;
21 which is a private meeting. It is an unprivileged meeting.

22 Mr. Turner was a stranger in terms of--if there
23 ever was a privilege--and I suggest there was not--clearly
24 though there is no privilege when Mr. Turner shows up. You
25 cannot have a privileged circumstance when you have a stranger.

1 They made a pass at suggesting that the July meeting
2 was--involved--had a man from the government attending, which
3 is the classic thing that we see here. And it is clear that
4 Mr. Maher--nobody has contradicted Mr. Maher. Sure, they
5 would have liked to hire him and it is probably all right
6 in England, it is probably all right in Europe. They do
7 things differently, but only a lunatic would have hired Mr.
8 Turner.

9 In this country, we are much more pious about what
10 our people do and can you imagine what would have happened
11 if favorable legislation to this industry came out in the
12 European market and Mr. Turner was some kind lawyer--so nobody
13 went believing that he was a lawyer, or that he was anything
14 but a visitor here and a stranger.

15 In addition, which I think is very significant,
16 is that very nice engineer from Bally came up, and he was
17 very candid. I said, "Well, would you tell your competitors
18 any kind of secret?" Again, you do not have to park your
19 common sense at the doorstep of the courthouse. You know
20 that this is a highly competitive business from hearing this
21 case and they jealously guard their secrets. They jealously
22 guard everything.

23 Sure, they can sit together and have a common interest
24 in stopping people from stealing their stuff, but that is
25 a far cry from saying when they get into a fight with each

1 other that they are really just saying, "You took my stuff,
2 I took your stuff." They are not condoning piracy or trying
3 to abrogate the protection of the copyright field.

4 Indeed, in this case--and I questioned Mr. Anderson
5 very carefully, and Your Honor is far more expert than I
6 am on this case--there is no attempt to say the laws of copy-
7 right do not apply. There is a question of whether that
8 gained copies.

9 Now, what we are told is that in March of '82,
10 when the Court of Appeals had finished ruling on this case
11 that, come October of '82, in comes an Englishman that nobody
12 had ever met, which, if you read the affidavit of the engineer,
13 he said he thought was an attorney that was representing
14 his interests and I do not know where he got that idea.
15 Mr. Katz said the same thing. There may have been some confu-
16 sion on their part, but I do not see why they should visit
17 that on us.

18 They all come to a meeting and they have a general
19 bull session for two days and they have not said to you one
20 thing that was secret.

21 Let me say two things about the cases, because
22 the cases are all fact cases. In Westinghouse, before they
23 disqualified Kirkland, the firm I once had some familiarity
24 with, they turned around and blurred the factual setting
25 and details. It turned out that Kirkland went to each member

1 privately and got private information that was marked confiden-
2 tial and they were reluctant to give it up and they gave
3 it up on a one to one basis so that they could do some lobbying
4 for the group as a whole.

5 The case that was cited to show that sub and parent
6 do not count--in the first place, that was Louis Nitzer's
7 firm, and they could--and the representation existed at the
8 very moment they were before the Court--as Judge Newman noticed.
9 And he said, in the future, as they litigated, he could find
10 out things from his representation of the association, which
11 was a collective bargaining association, and the corporation
12 was a member. There was only one corporation, there were
13 no subs; there was a division. What obviously had happened,
14 is the division that had the labor unit was part of the group,
15 but there was not even a separation of sub and parent, and
16 there was continuing representation.

17 I am suggesting to Your Honor that this is a very
18 simple case where, for three reasons, disqualification should
19 be denied.

20 First of all, there was no--by everybody's description,
21 this was not the classic test articulated by Wyzanski where
22 anybody thought he was giving information to the lawyer and
23 the lawyer was getting that information, namely Mr. Maher.

24 The only one that comes close to saying that is
25 the engineer who immediately says, "I'm not going to tell

1 anything to my brother competitors.

2 Second, there never was a privilege circumstance
3 at any time because they had strangers to the meeting, whether
4 it be Turner or the government people.

5 And third, third, they are trying to, in conclusory
6 ways, extend this thing to every sub of Bally, to everybody,
7 and indeed, to show you how broad they are, you have heard
8 here today all about copyright and about how it was Pac Man
9 and copyright and that is the problem.

10 I know Your Honor knows that sitting over in Judge
11 Marshall's Court is a motion to disqualify involving a patent
12 case. And you can be sure when we get over there, all of
13 these copyright words and patent and copyright are entirely
14 different. They are going to be patent, because, for better
15 or for worse, I think what really is troubling them is that
16 they think Mr. Maher got some education in how this industry
17 runs and they resented him using it any time, any place,
18 any how.

19 We have cited one case in our brief which shows
20 that in the bankruptcy court in New York, I think the Judge
21 was Laser, they said there was no such understanding, by
22 anybody an no reasonable person would believe that disqualifica-
23 tion would occur in circumstances similar to here.

24 Thank you.

25 THE COURT: Closing?

1 MR. BODE: We will be very brief.

2 I think that I am not going to reargue the facts.
3 But, I submit that Mr. Reuben is trying to fit the facts
4 into a square that they do not fit into. This was not a
5 CLE session and that, indeed, I suspect that their decision
6 in 1982, which they say was on business grounds not to undertake
7 this representation because they were counsel for the Associa-
8 tion, is a more clear indication of the judgment which ought
9 to be applied in this type of situation.

10 All that I want to say on the subject of confidential
11 information is that he cases establish two things.

12 First of all, that it is not the client's burden
13 to establish the exact nature of confidential communications
14 in these cases. Indeed, the Courts have recognized and it
15 is cited in the briefs, that that would defeat the very purpose
16 if you had to disclose in the hearings all of the confidential
17 matters that you are attempting to protect.

18 Secondly, it seems to me that Mr. Reuben--he asked
19 Your Honor not to shut your eyes to your experience as a
20 lawyer. Mr. Reuben is asking you to take a view--a very--
21 some sort of a view of the attorney-client relationship,
22 or conversations in that context, which is not the way I
23 submit lawyers view their responsibilities.

24 He suggests that you look at each conversation
25 and ask a client to come in and prove what was confidential

1 and say, "Well, you know, this was not really confidential.
2 Didn't somebody else maybe know about this. Couldn't you
3 maybe find about that and recall all the words?"

4 And that is not the environment in which the lawyer's
5 obligations to his clients are to be tested. Indeed, there
6 is a case which is cited in the briefs, General Electric
7 vs. Valeron, 428 F.Supp. at Page 74 where the Court says:

8 "The defendant also argues that in any event all
9 information obtained from General Electric by Kanter
10 has been published or is available from nonconfiden-
11 tial sources."

12 They cite another case, and the Court held the argument was
13 of no avail. The Court stated, quote:

14 "The client's privilege in confidential information
15 disclosed to his attorney is not nullified by the
16 fact that the circumstances to be disclosed are
17 part of the public record or that there are other
18 available sources for such information, or by the
19 fact that the lawyer received the same information
20 from other sources."

21 Close quote.

22 And we submit, Your Honor, that that is the kind
23 of attitude and test and manner by which these conversations
24 and communications are to be considered. And that, having
25 proved the existence of the relationship and the substantial

1 nature of the--the substantial relation between this case
2 and the matters discussed there, that it is inimicable to
3 the Canons to require the client to go further.

4 Thank you, Your Honor.

5 THE COURT: I am going to decide this motion from
6 the bench and then I want some assistance from the lawyers
7 and I will share with you the difficulty I have. I am presiding
8 over a jury trial which we begin at 9:00 o'clock in the morning
9 and go continuously until 5:30 or so each day and if you
10 do not know it, or do not sense it, it is extremely difficult
11 to write memoranda of law while presiding over a jury trial
12 at the pace I have just described to you.

13 So what I am going to ask each side, after I finish,
14 to submit to me a statement of the facts. Not in 1, 2, 3
15 or any such rigid way, but chronologically, a statement of
16 the facts, and a statement of the law, from which I will
17 base the conclusions of law that I will make.

18 I will then look at the submissions and to the
19 extent that I find necessary, I will edit or modify the findings
20 of fact which I will make from the bench and the conclusions
21 of law to which I will refer.

22 I will want a copy of the proceedings we have had
23 today and I think also that the statement of facts should
24 refer to the evidence in the record particularly so that
25 I can later check to be sure that these facts are supported

1 by the record.

2 This is a motion by the plaintiff Midwest--I am.
3 sorry--Midway Manufacturing Company--and Mr. Giles, correct
4 that. Midway Manufacturing Company to disqualify the law
5 firm of Reuben and Proctor from representing the defendants
6 in this case on the ground that that law firm, through one
7 of its partners, David W. Maher, was general counsel to the
8 Amusement Game Manufacturers Association between the period
9 May, 1981 to December 31, 1982. It is alleged that during
10 that period of time, Mr. Maher as a partner of the Reuben
11 and Proctor firm, acquired confidential information concerning
12 this case, and particularly, information concerning the rights
13 of the plaintiff Midway Manufacturing Company.

14 In support of the motion, a memorandum has been
15 submitted to the Court.

16 The motion is opposed by the Reuben and Proctor
17 firm and the Court has heard evidence consisting of the testimony
18 of Mr. A. Sidney Katz, Mr. Glen E. Braswell, Dr. Martin Keane;
19 and Exhibits have been admitted in evidence, and from the
20 evidence, the Court finds the facts generally as follows.

21 During this period of time alleged in the motion,
22 namely May 1, 1981 to December 31, 1982, David W. Maher of
23 the Reuben and Proctor firm was general counsel of the Amusement
24 Game Manufacturers Association. That Association has not
25 only individuals as members, but also corporations. The

1 applicants for membership submit information to the Association
2 as to the revenue or gross business, and based on that, the
3 qualifications for membership and the dues to be paid are
4 determined.

5 The corporate applicants for membership do not
6 disclose the identity of their subsidiaries. The amount
7 of revenue of the applicant corporation is suggested because
8 the Court assumes, and finds from the testimony that the
9 gross revenue of the applicant corporation includes the revenue
10 of the subsidiaries. Other than that, the general counsel
11 of the Association treats as a member of the Association
12 the corporation.

13 In this case, the evidence shows that Bally Manufac-
14 turing Company is the parent of the plaintiff Midway Manufac-
15 turing Company, sometimes referred to as Bally Midway. Bally
16 Manufacturing Company has a large number--the exact number
17 the Court does not know because the evidence does not indicate--
18 but a large number of subsidiaries.

19 Mr. Katz has testified that he, himself, does
20 not represent all subsidiaries of Bally Manufacturing Company,
21 only those subsidiaries designated to him by Bally Manufacturing
22 Company are his clients. One of them is Midway Manufacturing
23 Company, the plaintiff in this case, or Bally Midway.

24 The crux of this controversy centers on two meetings
25 held in October, 1982. On October 14 and 15, 1982. Mr.

1 Maher called Mr. Katz and invited him to the meeting. And
2 Mr. Katz went and there he spoke, and Mr. Katz says that
3 he disclosed or talked about some of the details of the defense
4 theory or the prosecution theory rather of the Midway Manufactur
5 ing Com- pany in this lawsuit.

6 The Court carefully observed Mr. Katz as he testified
7 and it was the distinct impression of this Court that Mr.
8 Katz was trying very hard to make it appear from his testimony
9 and his description of what went on in those two meetings
10 that he was disclosing in the presence of Mr. Maher confidential
11 information.

12 The Court has listened very carefully to what it
13 was that Mr. Katz revealed. The Court finds none of it was
14 confidential. It was ordinary matter about a lawsuit that
15 any lawyer would talk about in the presence of other individuals,
16 including lawyers. Even opposing lawyers. None of it was
17 confidential. None of it was not information that could
18 not be obtained elsewhere, and Mr. Maher has denied under
19 oath that he received any confidential information from Mr.
20 Maher as general counsel of the Association.

21 Therefore, the Court finds that there was no confiden-
22 tial disclosure made by Mr. Katz in the presence of Mr. Maher
23 in those meetings or any any time that Mr. Maher was the
24 general counsel of the Amusement Game Manufacturers Association.

25 The Court also finds that there is a serious question

1 in this case whether the plaintiff Midway Manufacturing Company
2 is in fact a member of the Association in question. It is
3 true that its parent corporation is a member, but there is
4 a serious question about it. This is a case, whether it
5 is unique among cases of this kind, this Court is not prepared
6 to determine right now.

7 The Court will venture to state, however, that
8 if one were to carefully study all of the cases in this field,
9 one would be hard put to find one exactly like it.

10 Not only is there a parent corporation claimed
11 to be a member of the Association, and thus a client of the
12 general counsel of the Association, but any number of subsidia-
13 ries. This would mean that a lawyer who undertakes to represent
14 an Association would not only have to be careful about how
15 he deals with members who appear on the records of the Associa-
16 tion as members, but also, he would be charged with the responsi-
17 bility to find out how many subsidiaries the corporation
18 has. It would stretch the concept of attorney-client relation-
19 ship almost infinitesimal.

20 So, the Court concludes that this was not that
21 kind of situation.

22 Also, concerning these meetings. These meetings
23 were to all the members of the Association. They had a distin-
24 guished barrister, Queen's counsel, from England talking
25 there. There is a dispute whether Mr. Turner was retained.

1 There was no evidence in this record whether he was. He
2 was simply a well known knowledgeable person in the field
3 of law involved who was brought here by the Association,
4 at the Association's expense, to speak to the members.

5 For these reasons, the motion to disqualify will
6 be denied. and I will now look at your submissions. In the
7 event that I determine that any different results should
8 be reached, I will inform you and enter an appropriate order.

9 The final order in this case will not be entered
10 until I have finished looking over the written submissions
11 of the parties.

12 That is the Court's ruling.

13 MR. REUBEN: Thank you, Your Honor.

14 Do you know when you would like submissions from

15 us?

16 THE COURT: Well, let us agree on a schedule.

17 First, I will ask you.

18 MR. REUBEN: Ten days I can submit--

19 THE COURT: Ten days and I assume, as I always
20 do in these matters, that I will be sitting in my Chambers
21 one day and I will see an opinion of the Court of Appeals
22 on this subject.

23 That is how the system functions, you know. I
24 do not know how many of you know that.

25 MR. REUBEN: Ten days, is fine, Your Honor.

1 THE COURT: Ten days. For both sides to submit
2 and a copy of the transcript.

3 MR.COHEN: Your Honor, this may be anticlimactic,
4 but we also deferred the question of discovery and the continuing
5 discovery.

6 THE COURT: Why do you not follow the suggestion
7 that Atari--I received a letter that Atari has worked out--
8 Atari says that they are withholding discovery.

9 MR.COHEN That is what we would like, Your Honor.

10 THE COURT: Why cannot all of you agree to that?

11 MR.COHEN Your Honor, the reason we cannot agree
12 to that is because Atari and North American are holding--separate-
13 ly holding settlement discussions that Midway is not a part
14 of.

15 Now, as far as Midway is concerned, there is no
16 possibility of settling this case; and whether our co-plainiff
17 settles out or not, we want to go forward.

18 THE COURT: What does this discovery consist of?

19 MR.COHEN: We want to take some depositions of the
20 People at North American who were responsible for making
21 the infringing game. We want to take depositions relating
22 to our claims that we are entitled to their profits.

23 THE COURT: The stay will be to when? What are
24 you suggesting, Mr. Anderson?

25 MR. ANDERSON: I would say 30 days should be adequate.

1 The parties are very close; they believe they are very close
2 to settlement.

3 THE COURT: Atari and North American?

4 MR. ANDERSON: Atari and North American on all
5 of the defendants, yes.

6 THE COURT: On all the defendants. Well, Midway
7 says they are--

8 MR. COHEN: We are not close to settlement at all,
9 Your Honor. We are plaintiff. We are not close to settling
10 with them at all.

11 THE COURT: Well, look, Mr. Anderson--

12 MR. ANDERSON: The whole case will change in posture
13 if we settle with Atari, Your Honor. We will bring a motion
14 to get Midway out, immediately upon settling with Atari because
15 we do not think Midway has any issues left or any standing
16 once we settle with Atari. So I suggest we stay.

17 THE COURT: Let me ask you this. Cannot you withhold
18 taking any depositions for 30 days? What is so important
19 about it that you cannot wait for 30 days?

20 MR. COHEN: Your Honor, we would like to have an
21 early trial date to try this case. It has been pending since
22 1981.

23 THE COURT: As I understand what is being said,
24 even though Midwest is not going to be included in the settle-
25 ment, as I understand it, it will affect the case.

MR. COHEN: That is not correct in our view, Your

1 I do not see how it can affect the case.

2 THE COURT: The motion will be denied. Let the
3 discovery proceed then, if that is the case, then let them
4 proceed with discovery. I would strongly believe that that
5 would be the case, but counsel who knows more about the case
6 says it will not.

7 Proceed with your discovery, then.

8 * * * *

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14
15 I, Roscoe C. Giles, certify that the foregoing
16 is a correct transcript from the record of proceedings in
17 the above-entitled matter.
18

19
20 Roscoe C. Giles, Jr. (J.M.)
21 Official Court Reporter
22
23
24
25

6-23-63
Date